CLERK'S COPY. 16244

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 138.

THE PULLMAN COMPANY, PLAINTIFF IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FILED JULY 10, 1902.

(18,230.)

16245

(18,230.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 377.

THE PULLMAN COMPANY, PLAINTIFF IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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1 Pleas and proceedings had and done at a regular term of the supreme court of Mississippi, begun and held in the court-room, in the capitol, in the city of Jackson, on the first Monday, the 4th day, of March, A. D. 1901.

Present: The Honorable Albert H. Whitfield, chief justice and the Honorable S. H. Terral and the Honorable S. S. Calhoon, associate justices; E. W. Brown, clerk of said court, in person and by W. J. Brown, Jr., his deputy. General J. A. Smith, marshal and Thomas Grant, porter.

Be it remembered, that heretofore, to wit, on the 2nd day of March, A. D. 1901, there was filed in the clerk's office of said court a certain transcript of the record from the circuit court of Hinds county, Mississippi, first district, which with the endorsements thereon is in words and figures following, to wit:

2 *Organization of Court.*

STATE OF MISSISSIPPI,
County of Hinds.

Be it remembered that a regular term of the circuit court of the county of Hinds and State of Mississippi was begun and holden at the court-house of said county in the city of Jackson, in first district of said Hinds county, on the 2nd Monday of January, 1901, it being the 14th day of said month, and the time and place fixed by law for holding said court, there were present: Hon. Rob't Powell, judge of the 7th circuit court district, State of Mississippi, J. B. Greaves, Esq., district attorney, R. J. Harding, sheriff, and J. T. White, clerk of said court.

And on the — day of said term of court, the same being — and the — day of January, 1901, came on to be heard the following-entitled cause, the papers and proceedings of which are as follows:

Declaration.

In the Circuit Court of the First District of Hinds County, Mississippi.

WIRT ADAMS, State Revenue Agent,
v.
PULLMAN PALACE CAR COMPANY.

Comes the plaintiff, Wirt Adams the duly elected, qualified and acting State revenue agent in and for the State of Mississippi, who here sues in his said official capacity for the use and benefit of said State and complains of the defendant The Pullman Palace Car Company a corporation existing under the laws of the State of Illinois and engaged in the business of a sleeping or palace car company and owning and operating sleeping cars in the State of Mississippi,

which said cars are run and operated in and through said
3 district and county and upon each of said cars defendant has its agent or conductor who has charge and control of the same for defendant, and for cause of action plaintiff shows the following:

That during the year 1892 and the year 1893 and the year 1894 the said defendant being a sleeping car company as aforesaid operated and ran its sleeping and palace cars over and upon two thousand miles of railroad track in the State of Mississippi, upon various lines of railroads therein and then and there offered to take and took passengers for hire upon its said sleeping or palace cars and carried them from various towns in Mississippi along its route to other and various towns in Mississippi (said traffic being wholly within the State of Mississippi) and so defendant carried passengers for hire upon its said sleeping or palace cars from one point to another point in the State of Mississippi.

That during all of said time there was imposed by law in Mississippi a privilege tax for each and every of said years, on each sleeping and palace car company carrying passengers from one point to another in the State of Mississippi, one hundred dollars, and in addition twenty-five cents per mile for each mile of railroad track over which the company runs its cars.

That under and by virtue of the laws of the State of Mississippi and by reason of the operation and running of said cars as aforesaid the said defendant became and was indebted, liable and bound to pay to the State of Mississippi the sum of one hundred dollars for each and every of said years, to wit: three hundred dollars, and in addition thereto it became indebted to and bound to pay said State twenty-five cents for each and every of said years for each and every of said two thousand miles, to wit: fifteen hundred dollars, said liability and indebtedness amounting to and being in the aggregate the sum of eighteen hundred dollars.

That the said defendant being indebted to the said State as aforesaid, and although often requested to pay said indebtedness,
4 has neglected, failed and refused to pay the same or any part thereof to the damage of said State in the sum of eighteen hundred dollars.

Wherefore the said plaintiff suing as revenue agent as aforesaid brings this his suit against said defendant and prays judgment for said sum of eighteen hundred dollars ($1,800.00) together with interest and cost of suit.

HARPER & POTTER,
Attorneys for Plaintiff.

Endorsed: Filed September 25, 1900. J. T. White, clerk, by E. D. Fondren, D. C.

Circuit Court Summons.

The State of Mississippi to the sheriff of Hinds county, Greeting:

We commend you hereby that you summon The Pullman Palace Car Company, defendant, in to be found in your county, so that it

be before the circuit court to be holden in and for the first district of said county at the court-house thereof, in the city of Jackson, on the 2nd Monday of January, 1901, to answer the declaration of Wirt Adams, State revenue agent etc., plaintiff, against the said defendant now on file in the clerk's office of said court, and have then and there this summons.

Witness the Hon. Robert Powell, judge of the seventh judicial district of this State the 3rd Monday of June, 1900, and seal of said court.

Issued 26th September, 1900.

J. T. WHITE, *Clerk*,
By E. D. FONDREN, *D. C.*

5 The declaration on file is founded on a suit against defendant for the non-payment of privilege taxes for the years 1892, 1893 and 1894. Total amount sued for is $1,800.00 and interest and costs. The amount actually demanded in this suit is the sum stated in the declaration, and lawful interest and costs. Judgment will be demanded at return term.

HARPER & POTTER, *P. Q.*

Declaration filed and summons issued.
J. T. WHITE, *Clerk*,
By E. D. FONDREN, *D. C.*

Endorsed.

Executed on the Pullman Palace Car Company by personally delivering to A. E. Sothren, their conductor, on Pullman palace car "Ascolea" a true copy of this writ Sept. 27, 1900.

R. J. HARDING, *Sheriff*,
By J. W. CLINGHAM, *D. S.*

Ex	$1.50
E. & R	.50
	$2.00

Demurrer to Declaration.

In the Circuit Court of Hinds County, Mississippi, First District, January Term, 1901.

WIRT ADAMS, State Revenue Agent,
v.
PULLMAN PALACE CAR COMPANY.

Comes the defendant, The Pullman Company, by its attorneys, and not confessing, etc., doth demur to plaintiff's declaration and for cause of demurrer assigns the following:

1. The declaration does not show that the defendant had an opportunity to pay the taxes in respect to which delinquency is
6 averred, and there was no provision of law affording to the defendant such opportunity.

2. The declaration does not aver that the tax collectors of the several counties in which defendant is alleged to have operated its cars have refused or willfully failed to collect said taxes.

3. The declaration does not aver that the amount of taxes payable by defendant for the years mentioned was ever legally ascertained or authenticated to any one having authority to collect.

Wherefore etc., defendant prays judgment etc.

McWILLIE & THOMPSON,
Attorneys for Defendant.

Endorsed: Filed January 14, 1901. J. T. White, clerk, by E. D. Fondren, D. C.

Judgment Overruling Defendant's Demurrer.

WIRT ADAMS, Revenue Agent, etc.,
v.
PULLMAN PALACE CAR COMPANY. } 3476.

This day came on to be heard the demurrer of the defendant to plaintiff's declaration and the court having heard argument and being fully advised thereof, doth order and adjudge that said demurrer be and the same is hereby overruled, and it is further ordered that defendant have leave to plead during the next two days, plaintiff in open court waiving affidavit of merits on defendant's application to plead over.

Defendant's First Plea.

In the Circuit Court of Hinds County, Mississippi, First District.

7 WIRT ADAMS, State Revenue Agent,
v.
PULLMAN PALACE CAR COMPANY. } 3476.

Comes the defendant, The Pullman Company, by its attorneys, herein sued as the Pullman Palace Car Company, and for plea herein says it is not indebted to the State of Mississippi in the said sum demanded in the plaintiff's declaration, nor of any part thereof, and of this it puts itself upon the country.

McWILLIE & THOMPSON,
Attorneys for Defendant.

Filed January 15, 1901.
J. T. WHITE, *Clerk*,
By E. D. FONDREN, *D. C.*

Defendant's Second Plea.

WIRT ADAMS, State Revenue Agent,
v.
PULLMAN PALACE CAR COMPANY. } 3476.

And for further plea in this behalf defendant says that it is a foreign corporation incorporated by and under the laws of the State of

Illinois and having its domicile in the city of Chicago therein; that during the said years 1892, 1893 and 1894 it had no property, office nor resident agent or employee in the State of Mississippi engaged in the operation of the business mentioned in plaintiff's declaration, and that defendant's palace and sleeping cars are and were the only cars of such character ever run in the State of Mississippi; that the sleeping cars and palace cars in use in Mississippi were manufactured by defendant in Illinois and not run by defendant in Mississippi, but were run therein by the several railroad companies hauling the same, under contracts by the terms whereof defendant for a specified consideration was required to furnish the said cars, and, as a
8 part of such consideration, acquired a right to charge each railroad passenger who should ride therein for a reserved seat in the daytime and a bed at night; that the said railroads ran and hauled sleeping cars and palace cars into and through the State of Mississippi; that the said cars were used and employed in interstate commerce, and to points in Mississippi to points outside of said State, from points outside of to points in Mississippi and from points outside of through that State to other points outside of the same; that the passengers carried on defendant's cars during said years from one point to another within the State of Mississippi laying a tax upon the business so operated and imposing penalties of fine and imprisonment for the violation thereof was, and is, as to this defendant, in contravention of section 8, article 1 of the Constitution of the United States committing to the Congress of the United States the regulation of commerce between the States, and is and was null and void; and this defendant is ready to verify.

McWILLIE & THOMPSON,
Attorneys for Defendant.

Filed January 15, 1901.
J. T. WHITE, *Clerk*,
By E. D. FONDREN, *D. C.*

Defendant's Third Plea.

WIRT ADAMS, State Revenue Agent,
v.
PULLMAN PALACE CAR COMPANY. } 3476.

And for further plea in this behalf defendant says that it is a foreign corporation incorporated by and under the laws of the State of Illinois and has its domicile in the city of Chicago therein and in the years 1892, 1893 and 1894 had no property, office nor resident agents or employees in the State of Mississippi engaged in
9 the business mentioned in plaintiff's declaration and that defendant's sleeping and palace cars are and were the only cars of such character ever run in the State of Mississippi; that prior to the first day of November, 1890, when defendant by the constitution of the State of Mississippi was made a common carrier within said State, and ever since the first day of November, 1890 the sleeping cars and palace cars of the defendant in said declaration men-

tioned were used and employed in said State in an interstate business, on railway lines extending from other States into Mississippi and through Mississippi into other States and were run from points in to points outside of Mississippi and through Mississippi from points outside of to other points outside of said State; that the profits realized by defendant from persons going from one point in Mississippi to another point in said State on its cars while used and employed in said State as aforesaid have never equaled the expenses properly chargeable against the same, and the deficit thus arising has always operated as a burden upon its interstate business; and defendant avers that the law of Mississippi of 1892 whereby defendant was required to pay a tax on its business under the penalties of fine and imprisonment after being made a common carrier as aforesaid was and is as to this defendant in contravention of section 8, article 1 of the Constitution of the United States whereby the regulation of commerce between the States was committed to the Congress of the United States and was and is null and void; and this defendant is ready to verify.

McWILLIE & THOMPSON,
Attorneys for Defendant.

Filed January 15, 1901.

J. T. WHITE, *Clerk*,
By E. D. FONDREN, *D. C.*

10 *Demurrer to Defendant's Second Plea.*

In the Circuit Court of the First District of Hinds County, Mississippi, January Term, 1901.

WIRT ADAMS, State Revenue Agent,
v.
THE PULLMAN COMPANY.

Comes the plaintiff Wirt Adams, State revenue agent, and as to the second plea by defendant pleaded to his declaration, says, that the matters therein mentioned are not sufficient in law to bar him from maintaining his aforesaid action. Wherefore plaintiff demurs to said second plea, and for cause of demurrer assigns the following reasons:

1. Because said plea sets up no valid defense to plaintiff's action.
2. Because said plea is a departure from the declaration.
3. Because said plea is insufficient in law.

And for other reasons to be assigned at the hearing.

HARPER & POTTER,
Attorneys for Plaintiff.

Filed January 17, 1901.

J. T. WHITE, *Clerk*,
By E. D. FONDREN, *D. C.*

Demurrer to Defendant's Third Plea.

In the Circuit Court of the First District of Hinds County, Mississippi, January Term, 1901.

WIRT ADAMS, State Revenue Agent,
v.
THE PULLMAN COMPANY.

Comes the plaintiff Wirt Adams, State revenue agent, and
11 as to *to* the third plea by defendant pleaded to his declaration, says:

That the matters therein contained are not sufficient in law to bar him from maintaining his aforesaid action. Wherefore plaintiff demurs to said third plea and for cause of demurrer assigns the following reasons.

1. Because said plea sets up no valid defense to plaintiff's action.
2. Because said plea is a departure from the declaration.
3. Because said plea is insufficient in law.

And for other reasons to be assigned at the hearing hereof.

Wherefore plaintiff prays judgment etc.

HARPER & POTTER,
Attorneys for Plaintiff.

Filed January 17, 1901.
J. T. WHITE, *Clerk*,
By E. D. FONDREN, *D. C.*

Order Sustaining Demurrer to Defendant's Second Plea.

WIRT ADAMS, State Revenue Agent,
v.
PULLMAN PALACE CAR COMPANY. } 3476.

Came on to be heard the demurrer of plaintiff to the second plea of defendant and the court having fully heard and considered the same, doth order and adjudge that the said demurrer be and the same is hereby sustained and that defendant be allowed to plead forthwith. To which action of the court sustaining said demurrer the defendant then and there accepted.

Order Sustaining Demurrer to Defendant's Third Plea.

WIRT ADAMS, State Revenue Agent,
v.
PULLMAN PALACE CAR COMPANY. } 3476.

12 Came on to be heard the demurrer of the plaintiff to the third plea of the defendant and the court having fully heard and considered the same doth now order and adjudge that said demurrer be sustained and that the defendant have leave to plead further forthwith. To the action of the court in sustaining said demurrer the defendant then and there excepted.

WIRT ADAMS, State Revenue Agent,
v.
PULLMAN PALACE CAR COMPANY, or PULLMAN COMPANY. } 3476.

Instruction for Plaintiff.

1. The court instructs the jury to find for plaintiff in the sum of $100.00 for each of the years 1892, 1893 and 1894 and the further sum of twenty-five cents for each and every of the miles of track over which defendant is shown by the evidence to have operated its cars and did business in the State of Mississippi for 1892 also 1893 and also 1894.

Given.

Filed February 6th, 1901.
J. T. WHITE, *Clerk*,
By E. D. FONDREN, *D. C.*

In the Circuit Court of the First District of Hinds County, Mississippi.

WIRT ADAMS, State Revenue Agent,
v.
THE PULLMAN PALACE — COMPANY. } 3476.

Bill of Exceptions.

Be it remembered that this cause was called and came on for trial on the 6th day of February, 1901, the same being a day
13 of the regular January term, 1901, when the following were agreed to be the facts in the case, to wit:

It is agreed between the plaintiff and the defendant in the above-styled cause that for and during each of the years 1892, 1893 and 1894 the defendant's sleeping cars were carried by various railroad companies over 1,536 miles of railroad track within the State of Mississippi, that such sleeping cars were under the control of the defendant, by its conductors and other employees and that the defendant offered to take and took passengers in each of said years over said distance of said track in Mississippi, for hire, in this: That it collected fares for berths and seats upon its said sleeping cars from point to point wholly within the State of Mississippi, persons going from one point to another point within Mississippi. That such fares went to the defendant and not to the said railroad companies, who only carried such sleeping cars of defendant under a contract with it.

That the defendant has never paid any privilege tax or had any privilege-tax license for any of said years to the State of Mississippi. That defendant was incorporated under the laws of Illinois as the "Pullman's Palace Car Company," and as a sleeping car company and that by act of the legislature of Illinois its name was changed in 1899 to that of "Pullman Company," which is its present name, both being the same incorporation. No point is to be made, how-

ever, on the name. That defendant was the only sleeping car company doing business in Mississippi during said years. That upon the trial of said cause in said court the defendant offered evidence to show that its receipts from persons going to one point in Mississippi to another point therein did not equal during said years its expenses properly chargeable against such receipts. To the introduction of such evidence the plaintiff objected and his objection was by the court sustained and the defendant then and there instantly excepted and its exceptions were allowed.

Defendant introduced in evidence the interrogatories pro-
14 pounded to defendant and the answers thereto which are in the words and figures following, to wit:

In the Circuit Court, First District, of Hinds County, Mississippi.

WIRT ADAMS, State Revenue Agent,
v.
PULLMAN PALACE CAR COMPANY. } 3476.

Notice to Take Depositions of the Defendant.

To the defendant, The Pullman Palace Car Company, or McWillie & Thompson, attorneys of record:

You will please take notice that the plaintiff in the above-styled case has this day filed in the office of said clerk of said court certain interrogatories to be answered by the Pullman Palace Car Company, as required by section 1761 Code of 1892, a copy of which interrogatories with a copy of the notice will be delivered to you.

HARPER & POTTER,
Attorneys for State Revenue Agent.

WIRT ADAMS, State Revenue Agent,
v.
PULLMAN PALACE CAR COMPANY. } 3476.

Interrogatories propounded by plaintiff to defendant in the above-styled cause, now pending in the circuit court, first district, of Hinds county, Mississippi, under section 1761, Code of 1892. Ananswers to the following interrogatories will be enforced under penalties therein provided.

Interrogatory No. 1. Are you now engaged in the sleeping or palace car business within the State of Mississippi, and were
15 you so engaged during the years 1892, 1893 and 1894 and how was your said business conducted within said State?

Interrogatory No. 2. Please state the name of each and every railroad in Mississippi upon which you ran your sleeping and palace cars during the years 1892, 1893 and 1894, and the number of miles over each of said roads upon which you operated your said cars in said State during said years.

Interrogatory No. 3. What was the total number of miles of railroad track in Mississippi over and upon which you ran your sleep-

ing and palace cars in the year 1892 and in the year 1893 and in the year 1894?

Interrogatory No. 4. State whether or not during the years 1892, 1893 and 1894 you offered to take passengers for hire upon your sleeping and palace cars from one point to another within the State of Mississippi.

Interrogatory No. 5. State whether or not during the years 1892, 1893 and 1894 you carried passengers for hire upon your sleeping and palace cars from one place to another within the State of Mississippi.

Interrogatory No. 6. State whether or not during the years 1892, 1893 and 1894 you carried passengers in your sleeping and palace cars from various points and towns in Mississippi to other points or places in said State, and did you not during said years carry passengers upon your said cars from one point in the State of Mississippi so that such carriage at times during all of said years was wholly within the State of Mississippi?

HARPER & POTTER,
Attorneys for Plaintiff.

16 *Answers to Interrogatories.*

In the Circuit Court of the First District of Hinds County, Mississippi.

WIRT ADAMS, State Revenue Agent,
v.
PULLMAN PALACE CAR COMPANY. } 3476.

STATE OF ILLINOIS,
County of Cook, } *ss:*

On this 26th day of December, A. D., 1900, personally appeared before the undersigned a notary public in and for the county and State aforesaid, A. S. WEINSHEIMER, who being first duly sworn, states upon oath that he is secretary, a superior officer and agent of the Pullman Company and that he appears for the purpose of answering certain interrogatories propounded by the plaintiff in the above-entitled cause now pending in the circuit court of the first district of Hinds county, Mississippi.

In answer to the first interrogatory he says:

That he attaches hereto and makes a part hereof, a copy of an act of the General Assembly of the State of Illinois incorporating Pullman's Palace Car Company, which shows the purpose for which the said company was incorporated; that upon the 30th day of December, 1899, the corporate name of the said company was, by due process of law, changed to "The Pullman Company;" that the corporate name of said company never has been "The Pullman Palace Car Company." He states that the Pullman Company is engaged in the business of manufacturing sleeping cars and furnishing such cars to railroad companies under contract for use by such railroad companies in operating their railroads through-

out the United States of America, the Dominion of Canada, the Republic of Mexico and in Europe; that it furnishes some such cars to railroads running into and through the State
17 of Mississippi, under contract with such railroad companies, and that Pullman's Palace Car Company was engaged in such business in the years 1892, 1893 and 1894. He further states that so far as such business was concerned in the years *in the years* 1892, 1893 and 1894, within the State of Mississippi, it consisted in the fact that in all such contracts with railroad companies Pullman's Palace Car Company, now the Pullman Company, in furnishing such cars to railroad companies to be used by such railroad companies in transporting a certain class of their passengers reserved to itself the right to charge a certain stipulated price, from such railroad passengers as might elect to ride in such cars, for a seat to be reserves by daytime and a place in which to sleep at night, and that it rented some such seats and berths to railroad passengers coming into said cars within the State of Mississippi; and that to this extent it was engaged in business in the State of Mississippi, but it was not engaged in any other business of any nature or character whatsoever within the State of Mississippi in said years.

In answer to second interrogatory he says:

Pullman's Palace Car Company did not run or operate its cars on any railroad; its cars were run and operated by the railroad companies, Pullman's Palace Car Company being simply permitted to collect a specific charge for a reserved seat by day or a bed at night, from such railroad passengers as elected to ride in said cars. Its cars were used by railroad companies within the State of Mississippi during the years 1892, 1893 and 1894 as shown in the following table:

Railroads.	Miles of track.		
	1892.	1893.	1894.
Illinois Central	301.62	301.62	389.45
Kansas City, Memphis & Birm	130.59	130.59	130.59
Louisville & Nashv	73.74	73.74	73.74
Memphis & Charleston	33.40	33.40	33.40
Mobile & Ohio	271.00	271.59	271.59
Yazoo & Miss. Valley	314.92	314.92	106.00
Georgia Pacific	96.78		

18 All such cars were used from points outside the State of Mississippi to points within that State; or from points within that State to points outside of that State; or from points outside the State of Mississippi through the State to points outside of the State;

but none of such cars were used wholly within the State of Mississippi.

In answer to the third interrogatory, he says:

Pullman's Palace Car Company did not, in the years 1892, 1893 and 1894, run or operate sleeping cars. As stated in answer to the preceeding interrogatory, such cars were operated and run by railroad companies, and Pullman's Palace Car Company had no control over the running or operation of such cars. It was simply permitted by the railroad companies using such cars to charge a certain stipulated price for a reserved seat by daytime or a bed to sleep in by night from such railroad passengers as elected to ride in such cars. The *the* total number of miles of railroad track in the State of Mississippi over which such cars were used by railroad companies in the year 1892 was 1,222.05; in the year 1893, 1,125.86; in the year 1894, 1,004.77 miles.

In answer to the fourth interrogatory he says:

That Pullman's Palace Car Company during the years 1892, 1893 and 1894, did not offer to take and did not take passengers for hire upon its sleeping cars from one point to another within the State of Mississippi but did offer to take and did collect fares for berths and seats upon its sleeping cars, as above stated, from persons going from one point to another in Mississippi.

In answer to fifth interrogatory he says:

Not except as stated in answer to interrogatory 4.

In answer to sixth interrogatory he says:

Not except as stated in answer to interrogatory four.

A. S. WEINSHEIMER.

Sworn to before me and subscribed in my presence the day and year first above written.

L. E. McPHERSON,
Notary Public.

Filed January 7, 1901.
J. T. WHITE, *Clerk,*
By E. D. FONDREN, *D. C.*

19 This was all the evidence in the case.

That upon the above proof the plaintiff upon the trial before the court and jury asked, and the court gave, on behalf of the plaintiff the following instruction, to wit: The court instructs the jury to find for plaintiff in the sum of $100.00 for each of said years 1892, 1893, and 1894 and the further sum of twenty-five cents for each and every of the miles of track over which defendant is shown by the evidence to have operated its cars and did business in the State of Mississippi for 1892 also 1893 and also 1894.

To the giving of said instruction the defendant then and there excepted.

That thereupon the jury retired and presently brought in their verdict in the following form, to wit: We the jury find for the plaintiff and assess his damages at the sum of $1,492.00.

And that thereupon defendant filed its motion for a new trial,

which is to be found in the record, which motion coming on to be heard was duly considered by the court and overruled; to which action of the court in overruling said motion defendant then and there excepted and now here tenders this its bill of exceptions which it prays may be signed by the court and made a part of the record in said cause. All of which is accordingly done this 6th February, 1901.

ROBERT POWELL, *Judge.*

WIRT ADAMS, State Revenue Agent,
v.
PULLMAN PALACE CAR COMPANY. } 3476.

Judgment.

Came on for trial the above-styled cause and issue being joined, also came a jury of good and lawful men, to wit: S. S. Gowaw and eleven others who being duly empanelled and sworn, do now upon their o-ths say: "We the jury find for the plaintiff and assess the damages at the sum of $1,452.00." It is therefore considered
20 by the court and so ordered and adjudged that the plaintiff do have judgment, and that he, Wirt Adams, State revenue agent, for the use and benefit of the State of Mississippi do have and recover of and from the defendant, The Pullman Company, or as called in the pleadings, the Pullman Palace Car Company, but whose name is agreed to be the Pullman Company the sum of fourteen hundred and fifty-two dollars as assessed by the jury, with interest thereon at the rate of six per cent. per annum from date together with all costs of suit, for all of which let execution issue.

Motion for New Trial.

In the Circuit Court of Hinds County, First District, January Term, 1901.

WIRT ADAMS, State Revenue Agent,
v.
PULLMAN PALACE CAR COMPANY. } 3476.

Comes the defendant and by its attorneys and moves the court to set aside the verdict and grant a new trial in the above cause, and for ground of motion assigns the following:

1. The court erred in overruling defendant's demurrer to plaintiff's declaration.

2. The court erred in sustaining plaintiff's demurrer to defendant's pleas.

3. The court erred in excluding the evidence offered by the defendant to show that its receipts from passengers going from one point in Mississippi to another point therein were during the years mentioned in the declaration less than the expenses chargeable against such receipts.

4. The court erred in giving for the plaintiff a peremptory instruction to the jury to find for the plaintiff.

Wherefore etc.,

McWILLIE & THOMPSON,
Attorneys for Defendant.

21 *Order Overruling Motion for New Trial.*

WIRT ADAMS, State Revenue Agent,
v. } 3476.
PULLMAN PALACE CAR COMPANY.

Comes on to be heard the motion of defendant to set aside the verdict and judgment of the court and to grant a new trial for causes stated therein, and the same having been fully considered by the court, it is now ordered and adjudged that said motion be and the same is hereby overruled, to which action of the court in overruling said motion the defendant then and there excepted and tendered its bill of exceptions which was signed by the court, filed and made part of the record in said cause.

Appeal Bond.

Know all men by these presents that we the Pullman Company principal and T. A. McWillie and R. H. Thompson sureties are held and bound unto Wirt Adams, State revenue agent in the sum of five hundred dollars for the payment of which well and truly to be made we bind ourselves jointly and severally firmly by these presents signed and dated the 21st day of February A. D. 1901.

The condition of this bond is such that whereas on the 6th day of February A. D. 1901, in a certain cause pending in the circuit court of Hinds county 1st district the said Wirt Adams, State revenue agent, plaintiff recovered judgment against the said Pullman Company, defendant in said cause for the sum of $1,452.00 and costs; and whereas the said defendant hath prayed an appeal from said judgment to the next term of the supreme court of Mississippi.

Now, therefore, if the said defendant The Pullman Company shall well and truly pay all the costs of said appeal in case the said judgment be affirmed, then the above obligation to be void other-
22 wise to remain in full force and effect.

THE PULLMAN COMPANY,
By McWILLIE & THOMPSON, *Att'ys.*
T. A. McWILLIE.
R. H. THOMPSON.

Filed and approved February 21st, 1901.

J. T. WHITE, *Clerk*,
By E. D. FONDREN, *D. C.*

Clerk's Certificate.

STATE OF MISSISSIPPI, }
Hinds County. }

I J. T. White, clerk of the circuit court in and for said county and State de hereby certify that the annexed and foregoing 21 pages contains a true, full and complete transcript of all papers and proceedings relative to the appeal in said cause of Wirt Adams, State revenue agent, *v.* Pullman Palace Car Company.

Given under my hand and the seal of said court this 1st day of March, A. D. 1901.

J. T. WHITE, *Clerk*,
By E. D. FONDREN, *D. C.*

Clerk's fee for transcript	$7.20
Approving bond	.50
Clerk's certificate	.25
	$7.95

Endorsed: Filed March 2, 1901. E. W. Brown, clerk. By W. J. Brown, Jr., D. C.

23 And on the 2nd day of March, A. D. 1901, the following assignment of errors was filed in said cause in words and figures following, to wit:

In the Supreme Court of Mississippi, First District, March Term, 1901.

PULLMAN PALACE CAR COMPANY }
v.
WIRT ADAMS, State Revenue Agent. }

Assignment of Errors.

Comes the appellant by its attorneys and for error in the record and proceedings in the court below herein assigns the following:

1. The court below erred in overruling defendant's demurrer to plaintiff's declaration.
2. The court below erred in sustaining plaintiff's demurrer to defendant's second plea.
3. The court below erred in sustaining plaintiff's demurrer to defendant's third plea.
4. The court below erred in overruling defendant's motion for new trial.

Wherefore, etc.

McWILLIE & THOMPSON,
Attorneys for Appellant.

Endorsed: Filed March 2, 1901. E. W. Brown, clerk. By W. J. Brown, Jr., D. C.

And on the 21st day of March, 1901 a day of the regular March term, 1901 the following order was made in said cause, to wit:

THE PULLMAN COMPANY
v.
WIRT ADAMS, State Rev. Agent. } 10025.

Argued orally by T. A. McWillie for appellant and W. R. Harper and W. H. Potter for appellee, and submitted on briefs by McWillie & Thompson for appellant and Harper & Potter for appellee.

And on the 8th day of April. 1901 the following final judgment was rendered by said supreme court, to wit:

24 March Term, A. D. 1901.

APRIL 8, A. D. 1901.

THE PULLMAN COMPANY
v.
WIRT ADAMS, State Rev. Agent, Use, &c. } 10025.

This cause having been submitted on a former day of this term on the record herein from the circuit court of Hinds county, first district, and this court having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order and adjudge that the judgment of said circuit court rendered in this cause at the January term thereof A. D. 1901 be and the same is hereby affirmed, and that appellee do have and recover of and from appellant, and T. A. McWillie and R. H. Thompson, sureties on appe*la* bond the sum of fourteen hundred and fifty-two ($1,452.00) dollars, being the amount of the judgment in the court below with interest at six per cent. per annum from the date of said judgment until paid, and the further sum of seventy-two $\frac{60}{100}$ dollars, being five per cent statutory damages on appeal, together with the costs of this cause in this court and the court below to be taxed, &c.

Opinion.

THE PULLMAN COMPANY
v.
WIRT ADAMS, State Rev. Agent, Use, &c. } 10025.

WHITFIELD, *C. J.:*

The statute under construction is in these words:

"SEC. 74. Sleeping cars.—On each sleeping and palace car company carrying passengers from one point to another in this State, $200.00. And in addition thereto, 25 cents a mile for each mile of railroad over which the company runs its cars in this State."

The whole purpose of the statute, from its terms manifestly is, to require a privilege tax to be paid for doing business within this State, and for that business alone. It relates exclusively to
25 the local business done by the Pullman Company within this State. It does not require any tax to be paid for the privi-

lege of doing the interstate business of the company. It does not in any manner effect its interstate business. "It can conduct its interstate business without paying the slightest heed to the act because it does not apply to, or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the State."

The case of Osborne *v.* Florida, 164 U. S., p. 650, is decisive of this case. The case of Crutcher *v.* Kentucky, 141 U. S., 47, is clearly discriminated from Osborne's case by Mr. Justice Peckham, who there says:

"It has never been held, however, that when the business of the company which is wholly within the State, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate there is no interference with that commerce by the State statute. It was stated by Mr. Justice Bradley, in the course of his opinion in the Crutcher case that: 'Taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection,' viz., an objection that the tax or license was a regulation of, or that it improperly affected, interstate commerce. We have no doubt that this is a correct statement of the law in that regard. The stat-e herein differs from the cases where statutes upon this subject have been held void because in those cases the statutes prohibited the doing of any business in the State whetever unless upon the payment of the fee or tax. It was said as to those cases that as the law made the payment of the fee, or the obtaining of the license a condition to the right to do any business whatever whether interstate or purely local, it was on that account a regulation of interstate commerce and therefore void. Here, however, under the construction as given by the State court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it had the right to conduct without regulation from the State.

26 The company in this case need take out no license and pay no tax for doing interstate business, and the statute is therefore valid." In Wirt Adams, rev. agent *v.* Telegraph Co. 71 Miss. 565, afterwards affirmed by the U. S. Supreme Ct., this court said: "Every tax is a burden, and to the extent imposed, is an interference with the pursuit or business upon -hich it is laid. If the business is partly interstate commerce, then that commerce is incidentally affected and interfered with by every tax, of any nature whatever, that may be levied on it. In the case at bar there is no direct burden upon interstate commerce; there is no further interference with it than will be found necessarily to result from the imposition of any burden of taxation in any shape." The contention that the appellant does its local business at a loss, and yet must do

it under the constitution of 1890 making it a common carrier, and hence that its interstate business is indirectly burdened is fallacious. Were that so, it would be the provisions of law declaring the sleeping car companies common carriers, that would contravene the interstate-commerce clause of the Constitution—not this license-tax statute. It is not for the appellant to get all out of the local business the traffic will bear and then escape the correlative burden of this license tax, by pleading that it, though conforming to the law making it a common carrier, as to profits, should not conform to the law taxing the business it does wholly local, and entirely within this State. Pickard *v.* Pullman, 117 U. S. 34 is wholly unlike this case. There a tax was levied on each sleeping car, whether in state, or interstate business and the tax was required to be paid if the local business had been entirely abandoned.

We think the action of the court below clearly right and the judgment is affirmed.

Endorsed: Filed April 18, 1901. E. W. Brown, clerk. By W. J. Brown, Jr., D. C.

27 And afterwards, to wit, on the 22nd day of April, A. D. 1901, the following suggestion of error was filed in said cause in words and figures following, to wit:

28 In the Supreme Court of Mississippi, First District.

PULLMAN PALACE CAR COMPANY }
v.
WIRT ADAMS, State Revenue Agent. }

Suggestion of Error.

Fearing that the position of the appellant was not stated with requisite clearness in the brief filed on its behalf this suggestion of error is submitted in order to do so with more accuracy.

What we contend for is that by the definite conclusion of the highest source of authority the appellant was not, under its pleas, doing any business in this State in the sense which would subject it to privilege taxation.

The case of Osborne *v.* Florida, 164 U. S. 650 on which the appellee relied was referred to in the brief of appellant because it was relied on by the appellee, but not because it or the case of Crutcher *v.* Kentucky which it reviewed really had any application to the case at bar.

The Osborne case was an express company case, and like the Postal Telegraph Company case decided by our own supreme court (71 Miss. 565), was wholly lacking in those features which mark the present controversy and bring it within the rule announced in Pickard *v.* Pullman Southern Car Co., 117 U. S. 34 as applicable to the peculiar state of facts distinguishing that case from all others passed upon by the Federal Supreme Court.

In the Pickard case the sleeping car company, as in this case, had

leased its cars to railway companies running them on their lines within the State whose privilege-tax law was alleged to have been violated; and as a part of the consideration of the lease were to receive the proceeds of sales of tickets for seats and couches in the cars so leased.

20 In view of the contractual relations of the parties the supreme court held that the service was a single one of carriage and it was immaterial that where the superior accommodations to be found in the sleeping cars were availed of the charge was divided between two recipients. During the term of the lease the railroad company in the exercise of its right as lessee had control of the cars and was empowered to use them in the manner most advantageous to its business without let or hindrance of the sleeping car company. Being this endued for the time being with a qualified ownership, the cars are to be treated as its cars, so far as concerns the business done by them. Suppose instead of a railroad company hiring facilities for comfortable repose, we take the case of a stage-coach line plying between this State and Tennessee which hires improved foot-warmers from a manufacturer in the latter State and uses the same on that portion of its route extending into this State as well as beyond its boundary line; can it be said that the Tennessee manufacturer is subject to a privilege tax in this State on account of such use of its foot-warmers? That the right to use is acquired through a lease and not an absolute sale can make no difference, and if the Pullman Company is operating its cars in Mississippi, so is the Baldwin Company operating all the locomotives now used in this State which have been the subjects of absolute sales to the several railroad companies.

This is the view taken by the Supreme Court of the United States in the Pickard case, where, as here, the sleeping car company had no agents or property in the State and its cars manufactured elsewhere only came into the State as the subjects of a lease to the railroad company. We quote from the opinion in that case as follows:

"The tax was a unit, for the privilege of the transit of the passenger and all its accessories. No distinction was made in the tax between the right of transit, as a branch of commerce between the States, and the sleeping and other conveniences which appertain to a transit in the car. The tax was really one on the right of

30 transit, though laid wholly on the owner of the car. So, too, the *the* service rendered to the passenger was a unit. The car was equally a vehicle of transit, as if it had been a car owned by the railroad company, and the special convenience or comforts furnished to the passenger has been furnished by the railroad company itself. As such vehicle of transit, the car, so far as it was engaged in interstate commerce, was not taxable by the State of Tennessee, and was not subject to its jurisdiction for purposes of taxation; and the plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable by way of license or privilege."

We further quote the following passage from an opinion of Lord

Coleridge which the above opinion also quotes as being in harmony with the view above expressed:

"We regard the additional accommodation afforded by the sleeping carriages as differing in no essential particular from the superior accommodation afforded by a second-class carriage over a third or by a first-class carriage over both. If the company issued tickets to all passengers alike, at the price charged to passengers travelling in third-class carriages, and then issued tickets, at corresponding prices, to those desiring to travel in a higher class of carriage, it could hardly be contended that duty would not be payable upon the prices paid for such second ticket. The passenger who is content to travel in a third-class or second-class carriage in the day, might well desire to travel in a carriage of a higher class by night; and, in a like manner, a passenger ordinarily travelling by day in a first-class carriage might desire the additional accommodation at night of a sleeping carriage. No separate charge is made in the present case; the charge, though written on a separate ticket, is, in our opinion, part of one charge for the conveyance of the passenger in a particular way, and is, therefore, a part of the charge for the conveyance, received and charged for such conveyance."

We repeat therefore that while under the decision in Os-
31 borne *v.* Florida our statute imposing a privilege tax on sleeping car companies doing business in this State is not violative of the Federal Constitution, that decision is inapplicable to the case in hand because the particular sleeping car company before the court was not on the facts pleaded doing business in this State, although like the company involved in the Pickard case its cars carried some passengers from one point to another within the State.

A misconception of the Pickard case appearing in the brief of the appellee has evidently led the court into error as to the point on which that case turned. We quote from that brief as follows:—

"A careful consideration of that case (Pickard case) will disclose that the privilege tax there levied was a tax upon each and every car run by the company without regard to whether such car was employed in local or interstate business. Under the act then in consideration, it would have been impossible for the company to have operated a single car for interstate business without first having paid such license. Therefore, the court held that the tax was a direct tax upon interstate business. Even if the company had discontinued its local business altogether, it would have been compelled to pay the license tax on all of its cars thereafter used in its interstate business. If no local business be done, no tax is required."

Now there is no amount of care or sagacious scrutiny within mortal power capable of disclosing that the Osborne decision was predicated of the idea that the sleeping car company would be compelled to pay the tax of $50.00 per car even should it abandon all local business. On the contrary, the decision is based on the distinct ground that in view of the status of the sleeping car company arising out of its contractual relations with the railroad company it could not be said to be doing business in Tennessee in the sense which would make it subject to the imposition of a privilege tax.

Moreover it is not true that under our statute the abandonment of all local business would afford any greater immunity from the burden laid upon the interstate business than under the Tennessee law.

32 The $50.00 per car was only a method of measuring the amount of the privilege tax and would remain quite as efficacious for that purpose in case no passengers were carried from point to point within the State. It was not a tax on the cars, but on the business in which the cars were employed. So in the present case the twenty-five cents per mile on the miles of railway over which the defendant's cars are run by the railroads is merely a method of measuring the amount of the tax, and is not a tax on the miles over which the cars are run, but on the business in which the cars are employed.

What reason is there for saying that the company involved in the Pickard case could not, by abandoning its local business, relieve itself of the local burden when we see that the court treats it as exempt from the local burden because it could not be said to be doing a local business, although the cars were in constant use and carried passengers from one point to another in Tennessee. The agreed statement of facts in the Pickard case, it will be remembered, shows that some passengers were carried from one point to another within the State, as in this case 117 U. S. 41.

Manifestly the decision was based upon an interpretation of the relations of the two companies under the contract of lease, and the suggestion advanced by the appellee is wholly unsupported by anything either expressly stated in or to be applied from the opinion and is inconsistent with the facts treated and the fundamental theory upon which the case was decided.

If we depart from the idea that the $50.00 per car and the twenty-five cents per mile were merely methods of measuring a privilege tax on the local business of those engaged in such business, Scylla threatens more darkly than Charybdis, for we would then have the case of a mileage tax imposed upon a company which the supreme court says, in view of the contract of lease, is not engaged in a local business in the sense which subjects such business to a local privilege tax although some passengers are carried on its cars from one point to another within the State. In other words, we would have a State mileage tax on interstate commerce, which no man

33 could defend. Recollecting that nothing is better settled than that the transportation of persons rests on the same plane with that of commodities so far as interstate commerce is concerned, we ask attention to the following extract from the State freight tax case, 8 Wall., 281:

"Merchandise is the subject of commerce. Transportation is essential to commerce, and every burden laid upon it is *pro tanto* a restriction. Whatever therefore may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the States, we regard it as established that no State can impose a tax upon freight transported from State to State or upon the transporter because of such transportation."

As it is adjudged law that one in the situation of appellant is not doing business in the State there is nothing for the law to operate upon so far as it is concerned save its interstate business.

We append an extract from a recent law magazine. Both the text of the article and the authorities are pertinent to the matter in hand.

McWILLIE & THOMPSON,
Attorneys for Appellant.

The freedom of interstate commerce from State restrictions is not dependent on the character of the parties that engage in it. That foreign corporations, as well as other persons, have a right to engage in interstate commerce without *without* interference by the State into which the commerce is carried is necessarily decided in a large number of cases. In the language of Mr. Justice Lamar in Norfolk & W. R. Co. *v.* Pennsylvania, 136 U. S. 104, 34 L. ed. 392, "It is well settled by numerous decisions of this court that a State cannot, in the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits." The only question
open to consideration in respect to the right of a foreign
34 corporation to make sales by agents within a State is whether
or not such sales constitute interstate commerce. If they do, the decisions unquestionably exempt the business from State interference. But this branch of the question is quite as well settled as the other. The drummer cases, such as Robbins *v.* Taxing District of Shelby County, 120 U. S. 489, 30 L. ed. 694, clearly holds that an agent of a non-resident taking orders by sample for goods in another State is engaged in interstate commerce. It seems clear that a sale by sample has no more of the interstate character than a sale made by description or by any other method. And in fact it is said by Mr. Justic Brewer in Brennan *v.* Titusville, 153 U. S. 289, 38 L. ed. 719, in holding that an agent is engaged in interstate commerce when he takes orders for a non-resident manufacturer of picture frames and portraits, that a regulation as to the manner of such sales, "whether by sample or not," is surely a regulation of commerce. The essential thing is that a contract is made between parties of different States for the sale of goods to be shipped from one State into another to complete the contract. Such a sale constitutes interstate commerce, and as to such sales State laws requiring corporations to comply with certain conditions before they can lawfully carry on business cannot have any operation. The right of a foreign corporation to have a place of business, and to carry a stock of goods into the State, is subject to the law of the State. It may be taxed on *on* business of that kind, or excluded altogether. But the right of a foreign corporation to send an agent into the State, and make a contract for the sale therein of a commodity which is then in another State, and is to be shipped into the State to fill the contract, is not subject to any prohibition or regulation by State law. Such a transaction is interstate commerce which is free from State restriction. Therefore, there is no taint of illegality

in the contract, and the right of the corporation to sue in the State to collect the purchase price of the sale is undoubted and absolute.

35 Endorsed: Filed April 22, 1901. E. W. Brown, clerk.

And afterwards, to wit, on the 20th day of May, A. D. 1901, being a day in said March term, 1901 of said supreme court the following order was made and entered in said cause to wit:

THE PULLMAN COMPANY
v.
WIRT ADAMS, State Rev. Agent, Use, &c. } 10025.

Suggestion of Error Overruled.

And afterwards, to wit, on the 25th day of June, 1901, a petition for writ of error was filed in said cause, which said writ is in words and figures following, to wit:

36 THE UNITED STATES OF AMERICA,
State of Mississippi.

THE PULLMAN COMPANY, THOMAS A. McWILLIE, and Robert H. Thompson
v.
WIRT ADAMS, State Revenue Agent. } Petition for Writ of Error.

To the Honorable Albert H. Whitfield, chief justice of the supreme court of the State of Mississippi:

The petition of the Pullman Company and Thomas A. McWillie and Robert H. Thompson respectfully shows:

That on the 8th day of April, A. D. 1901, the said supreme court rendered a judgment against petitioner in a certain cause wherein your petitioner The Pullman Company was the appellant, and Wirt Adams, State revenue agent of the State of Mississippi was the appellee, a judgment was rendered affirming the judgment of the circuit court for the first district of Hinds county in said State and rendering judgment against said Pullman Company for the sum of fourteen hundred and fifty-two dollars and interest thereon from the 6th day of February, A. D. 1901, at the rate of six per cent. per annum until paid together with all the costs of said cause, and also against the said Thomas A. McWillie and Robert H. Thompson, as sureties on its appeal bond for the costs of said cause in said supreme court; that in said suit was drawn in question the validity of a certain statute of the State of Mississippi on the ground of the same being repugnant to the Constitution of the United States, and the decisions of said supreme court was in favor of the validity of such statutes; and that in said suit was also drawn in question the validity of an authority exercised by the said Wirt Adams, State revenue agent, under the said statutes of said State on the ground that the same is repugnant to the Constitution of the United States, and

the decision of the said supreme court was in favor of the
37 validity of such authority; and the decision of the said supreme court of the State of Mississippi was final, and the said supreme court is the highest court of resort in said State.

Wherefore and whereby petitioners are aggrieved and they pray for a writ of error, with citation and supercedeas, returnable into the Supreme Court of the United States on the —.

And as in duty bound they will ever pray, &c.

THE PULLMAN COMPANY,
By McWILLIE & THOMPSON, *Att'ys.*
THOMAS A. McWILLIE.
ROBERT H. THOMPSON.

Endorsed: Filed June 25, 1901. E. W. Brown, clerk, by W. J. Brown, Jr., D. C.

STATE OF MISSISSIPPI:

Desiring to give petitioners an opportunity to test in the Supreme Court of the United States the questions presented in the foregoing petition and in the assignment of errors by which it is accompanied, it is ordered that a writ of error be, and the same is hereby, allowed to the said court, and that the same be made a supercedeas bond in the penal sum of three thousand dollars, also herewith presented, being hereby approved.

In testimony whereof witness my hand this 28 day of June, A. D. 1901.

ALBERT H. WHITFIELD,
Chief Justice Supreme Court, State of Mississippi.

Endorsed: Filed June 25, 1901. E. W. Brown, clerk, by W. J. Brown, Jr., D. C.

38 STATE OF MISSISSIPPI:

In the Supreme Court, March Term, 1901.

THE PULLMAN COMPANY
v.
WIRT ADAMS, State Revenue Agent.

I, Albert H. Whitfield, chief justice of the supreme court of the State of Mississippi at the present time and upon the argument and hearing of the above-entitled appeal, do hereby certify:

1. That upon said argument and hearing the validity of certain legislation of said State, viz: section 3387 of the Annotated Code of 1892, of said State, imposing a tax upon sleeping and palace car companies, was drawn in question by the Pullman Company on the ground of such legislation being repugnant to clause 3 section 8 of article 1 of the Constitution of the United States in that such legislation imposed a burden upon and constituted a regulation of the commerce carried on by the said Pullman Company among the

States; and that the decision of the said supreme court of Mississippi was in favor of the validity of such legislation.

2. That upon said argument and hearing was drawn in question the validity of an authority exercised by said Wirt Adams, State revenue agent of the State of Mississippi, in demanding payment and attempting by suit to coerce payment by the Pullman Company under said section 3387 of the Annotated Code of said State of the privilege taxes thereby imposed on sleeping car companies and palace car companies carrying passengers from one point to another in said State on the ground that the same is repugnant to clause 3 of section 8 of article 1 of the Constitution of the United States in that the exercise of such imposed a burden upon and constituted a regulation of the commerce among the States carried on by the said Pullman Company; and that the decision of the said supreme court of Mississippi was in favor of the validity of such authority.

39 In witness whereof I have hereto subscribed my name this — day of ——, A. D., 1901.

ALBERT H. WHITFIELD,
Chief Justice of Supreme Court of Mississippi.

Endorsed: Filed June 28, 1901. E. W. Brown, clerk, by W. J. Brown, Jr., D. C.

I, E. W. Brown, clerk of the supreme court of the State of Mississippi do hereby certify that the Honorable Albert H. Whitfield, by whom the foregoing certificate was made and given, was at the time of making and giving the same, and is now chief justice of the supreme court of Mississippi, to whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere, and that his signature subscribed thereto is genuine.

In witness whereof I have hereto set my hand and affixed the seal of the supreme court of Mississippi, this the 11th day of July, A. D. 1901.

[Seal State of Mississippi Supreme Court.]

E. W. BROWN, *Clerk*,
By W. J. BROWN, Jr., *D. C.*

40 Know all men by these presents that we, The Pullman Company, principal, and Thomas A. McWillie and Robert H. Thompson, principals, and John Hart and J. C. Ward sureties, are held and firmly bound unto Wirt Adams, State revenue agent of the State of Mississippi, in the full and just sum of three thousand dollars, to be paid to the said Wirt Adams, revenue agent, his successors in office, or his certain attorney, executors or administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, successors, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of June, in the year of our Lord, nineteen hundred and one.

Whereas lately, at a supreme court of the State of Mississippi, in

a suit depending in said court between The Pullman Company, appellant, and Wirt Adams, State revenue agent of the State of Mississippi, appellee, a judgment was rendered against the said Pullman Company and Thomas A. McWillie and Robert H. Thompson, sureties on its appeal bond, and the said Pullman Company and the said McWillie and Thompson obtained a writ of error and filed a copy thereof in the clerk's office in the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Wirt Adams, State revenue agent, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof.

Now the condition of the above obligation is such that if the said Pullman Company, Thomas A. McWillie and Robert H. Thompson shall prosecute this writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and effect.

THE PULLMAN COMPANY, [SEAL.]
By McWILLIE & THOMPSON, *Att'ys.*
ROBERT H. THOMPSON. [SEAL.]
TH'S A. McWILLIE. [SEAL.]
JOHN HART. [SEAL.]
J. C. WARD. [SEAL.]

I approve this bond.
June 28th, 1901.

ALBERT H. WHITFIELD,
Ch. J. Sup. Ct., Miss.

[Endorsed:] 10025. The Pullman Company *et al. v.* Wirt Adams, State revenue agent Writ of error bond. Filed June 28, 1901. E. W. Brown, clerk, by W. J. Brown, Jr., D. C.

41 I, E. W. Brown, clerk of the supreme court of the State of Mississippi, do hereby certify that this and the foregoing and annexed forty pages contain a full, true and correct copy of the record and proceedings in the case of The Pullman Company vs. Wirt Adams, State revenue agent, use &c. lately pending in said supreme court and numbered 10025 on the docket of said court, together with a copy of the written opinion of said court on confirming the judgment of the circuit court of the first district of Hinds county, Mississippi.

In testimony whereof, witness my hand and the seal of said supreme court of Mississippi, this 11th day of July, A. D. 1901.

[Seal State of Mississippi Supreme Court.]

E. W. BROWN, *Clerk*,
By W. J. BROWN, JR., *D. C.*

42 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the State of Mississippi, Greeting:

Because in the record and the pleadings and also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit, between The Pullman Company and Wirt Adams, State revenue agent, and wherein judgment was rendered in favor of said plaintiff in said court on the 8th day of April, A. D. 1901, against said defendant in said court, said Pullman Company, and Thomas A. McWillie and Robert H. Thompson, its sureties, and in which suit was drawn in question the validity of certain statutes of the State of Mississippi, on the ground of their being repugnant to the Constitution of the United States and the decision of the said supreme court was in favor of the validity of such statutes; and that in said suit was also drawn in question the validity of an authority exercised by the said Wirt Adams, State revenue agent, under the said statutes of said State on the ground that the same is repugnant to the Constitution of the United States, and the decision of the said supreme court was in favor of the validity of such authority, a manifest error hath happened to the great damage of said Pullman Company and of said Thomas A. McWillie and Robert H. Thompson, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at

43 Washington, on the 25th day of July next, in the said Supreme Court to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of June, in the year of our Lord nineteen hundred and one.

Witness also my signature and the seal of the circuit court of the United States in and for the southern district of Mississippi this the day and year aforesaid.

[Seal U. S. Circuit Court, District of Mississippi, Southern Circuit.]

L. B. MOSELEY, *Clerk.*

In obedience to the within writ of error I herewith return the same and send therewith to the Supreme Court of the United States, under my hand and the seal of the supreme court of Mississippi, directly and openly the record and proceedings in the cause in said writ mentioned with all things concerning the same.

In testimony whereof witness my signature and the seal of said supreme court of Mississippi this 11th day of July, 1901.

[Seal State of Mississippi Supreme Court.]

E. W. BROWN, *Clerk*,
By W. J. BROWN, JR., *D. C.*

[Endorsed:] 10025. The Pullman Company *et al. v.* Wirt Adams, State rev. agt. Writ of error. Filed June 28, 1901. E. W. Brown, clerk, by W. J. Brown, Jr., D. C.

44 UNITED STATES OF AMERICA, *ss:*

To Wirt Adams, State revenue agent of the State of Mississippi, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the supreme court of the State of Mississippi, wherein The Pullman Company and Thomas A. McWillie and Robert H. Thompson are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Albert H. Whitfield, chief justice of the supreme court of the State of Mississippi, this 28th day of June, 1901.

ALBERT H. WHITFIELD,
Chief Justice of the Supreme Court of Mississippi.

To the U. S. marshal, so. dist. of Mississippi to execute and return.

[Seal U. S. Circuit Court, District of Mississippi, Southern Circuit.]

L. B. MOSELEY, *Clerk.*

June 29, 1901.

[Endorsed:] Entered, No. 465, page 94. The Pullman Company *et al. v.* Wirt Adams, State revenue agent. Citation.

45 UNITED STATES OF AMERICA, }
Southern District of Mississippi. }

Received the within citation on the 29th day of June 1900, and served the same on the same day on Wirt Adams, State revenue agent of the State of Mississippi, personally by reading the same to him, and also by delivering to him in his own hands a true and exact copy of the same; also delivered to him at the same time a true and exact copy of the writ of error in the cause mentioned in said citation, issued pursuant to the order allowing the same of the Hon. Albert H. Whitfield, chief justice of the supreme court of

Mississippi, by L. B. Moseley, clerk of the circuit court of the United States in and for the southern district of Mississippi.

This the 29 day of June A. D. 1901.

F. W. COLLINS,
U. S. Marshal,
By R. O. EDWARDS,
Deputy U. S. Marshal.

Marshal's fees, $2.00.

UNITED STATES OF AMERICA,
Southern District of Mississippi.

Personally appeared before me, L. B. Moseley, clerk of the circuit court of the United States in and for the southern district of Mississippi R. O. Edwards deputy marshal of the United States in and for the district aforesaid, duly appointed according to law, who being by me first duly sworn, on oath saith that the foregoing return made by him of a service of the citation and copy of the writ of error in this case of The Pullman Company, plaintiff in error against Wirt Adams State revenue agent defendant in error, made on the — day of ——, 1901, is true in every particular.

R. O. EDWARDS.

Sworn to and subscribed before me this 29 day of June 1901.

[Seal U. S. Circuit Court, District of Mississippi, Southern Circuit.]

L. B. MOSELEY, *Clerk.*

[Endorsed:] 10025. The Pullman Company *et al. v.* Wirt Adams, State revenue agent. Citation & return of service. Filed July 4, 1901. E. W. Brown, cl'k, by W. J. Brown, Jr., D. C.

46 In the Supreme Court of the United States.

THE PULLMAN COMPANY ET AL., Plaintiffs in Error,
v.
WIRT ADAMS, State Revenue Agent, Defendant in Error.

Assignment of Errors.

Afterwards to wit on the — day of —— in the year of our Lord nineteen hundred and one before the justices of the Supreme Court of the United States at the Capitol in the city of Washington comes The Pullman Company and Thomas A. McWillie and Robert H. Thompson, plaintiffs in error, by their attorney, and the attorney of each of them, John S. Runnells, and say that in the record and proceedings aforesaid there is manifest error in the particulars following, to wit:

The said supreme court of the State of Mississippi erred in rendering the judgment of April 8, 1901, whereby the section 3387 of the Annotated Code of 1892 of said State was given effect as imposing a valid privilege tax upon the Pullman Company and the com-

merce between the States carried on by said company was burdened and regulated by said State legislation, contrary to clause 3, section 8, article I of the Constitution of the United States.

2. The said supreme court erred in holding that the circuit court of Hinds county committed no error in sustaining the demurrer of the plaintiff, said Wirt Adams, State revenue agent, to the second plea of the defendant, The Pullman Company, the effect whereof was violative of clause 3 of section 8 of article I of the Constitution of the United States, as being in derogation of the power of the Congress of the United States to regulate commerce among the States.

3. The said supreme court erred in holding that the circuit court of Hinds county committed no error in sustaining the demurrer of the plaintiff, said Wirt Adams, State revenue agent, to the third plea of the defendant, The Pullman Company, the effect whereof
47 was violative of clause 3 of section 8 of article I of the Constitution of the United States as being in derogation of the power of the Congress of the United States to regulate commerce among the States.

4. The said supreme court erred in holding that the circuit court of Hinds county committed no error in charging the jury at plaintiff's request to find for the plaintiff, the said Wirt Adams, State revenue agent, the effect whereof was violative of clause 3 of section 8 of article I of the Constitution of the United States as being in derogation of the power of the Congress of the United States to regulate commerce among the States.

Wherefore the said plaintiffs in error pray that the said final judgment of the supreme court of Mississippi be reversed etc.

JOHN S. RUNNELLS,
Attorney for Plaintiffs in Error.

Fee for making this transcript $24.75 paid by the Pullman Company per McWillie & Thompson.

E. W. BROWN, *Clerk*,
By W. J. BROWN, JR., *D. C.*

[Endorsed:] 10025. The Pullman Company *et al. v.* Wirt Adams State rev. agt. Assignment of errors. Filed June 28, 1901. E. W. Brown, clerk, by W. J. Brown, Jr., D. C.

Endorsed on cover: File No. 18,230. Mississippi supreme court. Term No. 377. The Pullman Company, plaintiff in error, *vs.* Wirt Adams, State revenue agent. Filed July 18th, 1901.

16261

IN THE

Supreme Court of the United States

No. 138.

THE PULLMAN COMPANY, *Plaintiff in Error*, vs. WIRT ADAMS, State Revenue Agent, *Defendant in Error*.	Error to Supreme Court of Mississippi.

BRIEF FOR PLAINTIFF IN ERROR

This action was brought in a state court in Mississippi, by defendant in error, to recover from plaintiff in error certain privilege taxes for the years 1892, 1893 and 1894. The action was founded on the following provisions of the Mississippi code of 1892:

Chapter 108 of the Mississippi code of 1892 is entitled: "Privilege Taxes." The first section, 3317, is:

"A tax on privileges and levied as follows, to-wit,"

"3387. Sleeping-car Companies.

On each sleeping and palace car company carrying passengers from one point to another, within this state, one hundred dollars, and twenty-five cents per mile for each mile of railroad track on which the company runs its cars."

Section 3401 provides, among other things, that:

"Any person who shall exercise any of the privileges enumerated in this chapter without first paying the tax and procuring license as required, shall on conviction be fined not less than double the tax imposed on such privilege or shall be imprisoned in the county jail not more than six months, or both."

Plaintiff in error pleaded the general issue and two special pleas. The first special plea was as follows:

"And for a further plea in this behalf, defendant says that it is a foreign corporation incorporated by and under the laws of the state of Illinois, and having its domicile in the city of Chicago therein; that during the said years 1892, 1893 and 1894 it had no property, office nor resident agent or employee in the state of Mississippi engaged in the operation of the business mentioned in plaintiff's declaration, and that defendant's sleeping and palace cars are and were the only cars of such character ever run in the state of Mississippi; that the sleeping cars and palace cars in use in Mississippi were manufactured by defendant in Illinois and not run by defendant in Mississippi, but were run therein by the several railroad companies hauling the same, under contracts by the terms whereof defendant, for a specified consideration, was required to furnish the said cars, and, as a part of such consideration, acquired a right to charge each railroad passenger who should ride therein for a reserved seat in the day time and a bed at night; that the said railroads ran and hauled said sleeping-cars and palace cars into and through the state of Mississippi; and that the said cars were used and employed in interstate commerce and from points in Mississippi to points out of said state, from points outside of to points in Mississippi and from points outside of through that state to other points outside of the same; that the passengers carried on defendant's cars during said years from one point to another within the state of Mississippi [bore an inconsiderable proportion to the other passengers carried thereon, and that the statute of Mississippi] laying a tax upon the business so operated and imposing penalties of fine and imprisonment for the violation thereof was and is, as to this defendant, in con-

travention of Section 8 Article I of the Constitution of the United States committing to the Congress of the United States the regulation of commerce between the states, and is and was null and void; and this, defendant is ready to verify" (pr. rec. pp. 4-5).

The words in brackets were omitted by mistake.

The second special plea alleged substantially the same matters as the first special plea, and, in addition, that by the Mississippi Constitution of 1890, plaintiff in error was made a common carrier, that the profits realized from persons carried from point to point within the state had never equaled the expenses properly chargeable against that service and that the deficit thus arising had always operated as a burden upon its interstate business (pr. rec. pp. 5-6).

The section of the Constitution set up in the second plea is as follows:

"Section 195. Express, telegraph, telephone and sleeping-car companies are declared common carriers in their respective lines of business, and subject to liability as such."

This provision of the state constitution, declaring sleeping-car companies common carriers, of course laid upon such companies the obligation of furnishing their accommodations to all persons properly applying therefor, and thus compelled them to accept intra-state business upon interstate vehicles of transportation, whether the sleeping-car companies wished to do so or not. Such companies are probably subject to this duty of furnishing accommodations to persons properly applying therefor under the law of the land, independent of state constitutions or statutes.

Demurrers interposed to the two special pleas were sustained, and, the case going to trial, the court excluded all evidence of the matters set up in the special pleas and di-

rected the jury to find for the revenue agent. A motion for a new trial having been overruled, plaintiff in error prosecuted an appeal to the supreme court of Mississippi, which affirmed the judgment of the trial court on the opinion shown in the record (pr. rec. pp. 16-18).

In this opinion section 74 of the Mississippi act of 1898 is inadvertently cited as imposing the taxes sued for. Code section 3387 above quoted was the law in force during the years 1892-4 when the taxes sued for are alleged to have accrued and is the section considered by the state supreme court in its certificate of a federal question (pr. rec. pp. 24-25).

The sections are substantially similar, except that, in imposing the tax of twenty-five cent per mile, the act of 1892 imposed a tax on each mile "on which the company runs its cars," while section 74 of the act of 1898, quoted in the state supreme court opinion, provides for such taxes on each mile "over which the company runs its cars *in this state.*"

The character of the business in which plaintiff in error was engaged in Mississippi is fully shown in the record. It is an Illinois corporation, organized for and engaged in the business, among other things, of constructing and operating sleeping cars. These cars are furnished or rented to railroad companies to be used by such railroad companies in the transportation of passengers.

Plaintiff in error "did not in the years 1892, 1893 and 1894 run or operate sleeping cars." Such cars "were operated and run by railroad companies, and the Pullman Palace Car Company had no control over the running or operation of such cars" (pr. rec. pp. 11-12). These sleeping cars were therefore as much under the control of the railroad companies as any other rolling stock which they hired.

The Pullman Company, however, reserved the right to furnish sleeping accommodations to railroad passengers and to collect charges therefor, and for that purpose had sleeping-car conductors and porters on such sleeping cars. The sleeping-car company received no part of the charge for transportation.

The business in which the plaintiff in error was engaged in Mississippi and the joint use of the cars by the railroad and sleeping-car companies were therefore exactly the same as shown in *Pickard* v. *Pullman Company,* 117 U. S., 34.

The pleas demurred to set up that plaintiff in error had no property, office or resident agent or employee in the state of Mississippi, and the evidence shows (pr. rec. 11) that the plaintiff in error was not engaged in any business of any nature or character whatsoever in Mississippi during the years referred to, other than furnishing sleeping accommodations on said sleeping cars.

It also appears that *all* the sleeping cars of plaintiff in error referred to, were operated and run from points outside of Mississippi to points within that state; or from points within that state to points out of the state; or from points outside of the state through the state to other points outside of the state; and that none of such cars were used wholly within the state of Mississippi or used wholly between points within the state.

The case therefore is not embarrassed by any consideration of cars operated exclusively within the state. The continuous run of every car was principally without the state. The cars were operated over six or seven railroads that passed through the state, two of the principal of which were the Illinois Central Railroad and the Mobile & Ohio Railroad.

It appears from the evidence and the stipulation of facts (pr. rec. 8) that certain railroad passengers, riding on these interstate trains applied for and were furnished by plaintiff in error with certain sleeping accommodations from one point to another in Mississippi. It was set up in the special pleas that such local passengers bore an inconsiderable proportion to the other passengers carried on such cars, and that the profits realized from such local passengers had never equaled the expenses properly chargeable against the same, and that the deficit thus arising from local business always operated as a burden on the interstate business.

The special pleas were held bad on demurrer. Evidence was offered in support of these allegations of the special pleas but the court refused to admit such evidence (pr. rec. 9).

Of course plaintiff in error was obliged to furnish these local passengers with sleeping car accommodations whether it wished to do so or not. It was not at liberty to decline to engage in this local business.

Errors Relied on.

Plaintiff in error insists that under the circumstances of this case no privilege tax can be imposed upon it or the business in which it is engaged, because it is engaged in interstate commerce and any such tax is an interference with the freedom of interstate commerce and that the fact that a few local passengers are carried on the interstate cars does not give the state of Mississippi the right to impose the tax sought to be collected in this action.

The errors assigned appear upon pages 29 and 30 of the printed record and are as follows:

"The said supreme court of the State of Mississippi erred in rendering the judgment of April 8, 1901, whereby the section 3387 of the Annotated Code of 1892 of said State was given effect as imposing a valid privilege tax upon the Pullman Company and the commerce between the States carried on by said company was burdened and regulated by said State legislation, contrary to clause 3 section 8, article 1 of the Constitution of the United States.

"2. The said supreme court erred in holding that the circuit court of Hinds county committed no error in sustaining the demurrer of the plaintiff, said Wirt Adams, State revenue agent, to the second plea of the defendant, The Pullman Company, the effect whereof was violative of clause 3 of section 8 of article 1 of the Constitution of the United States, as being in derogation of the power of the Congress of the United States to regulate commerce among the States.

"3. The said supreme court erred in holding that the circuit court of Hinds county committed no error in sustaining the demurrer of the plaintiff, said Wirt Adams, State revenue agent, to the third plea of the defendant, The Pullman Company, the effect whereof was violative of clause 3 of section 8 of article 1 of the Constitution of the United States as being in derogation of the power of the Congress of the United States to regulate commerce among the States.

"4. The said supreme court erred in holding that the circuit court of Hinds county committed no error in charging the jury at plaintiff's request to find for the plaintiff, the said Wirt Adams, State revenue agent, the effect whereof was violative of clause 3 of section 8 of article 1 of the Constitution of the United States as being in derogation of the power of the Congress of the United States to regulate commerce among the States."

BRIEF.

I.

The operation of the sleeping-cars and the business in which plaintiff in error is engaged in Mississippi constitute interstate commerce, and therefore the State cannot call such business a privilege and impose a privilege tax thereon.

Pickard v. *Pullman Co.*, 117 U. S., 34.
Crutcher v. *Kentucky*, 141 U. S., 47.
Leloup v. *Mobile*, 127 U. S., 640.

II.

There is a well-defined difference between a license tax affecting interstate commerce, which is void, and a properly proportioned property tax on property or capital stock engaged in interstate commerce.

Adams Express Co. v. *Ohio*, 165 U. S., 220.
American Refgtg. Co. v. *Hall*, 174 U. S., 70.
Pullman Co. v. *Penna.*, 141 U. S., 18.
Postal Co. v. *Adams*, 155 U. S., 688.

III.

If the interstate business and local business are necessarily so mixed as to preclude separation a tax thereon is invalid.

Ratterman v. *Western Union*, 127 U. S., 411.
Leloup v. *Mobile*, 127 U. S., 640.
State Freight Tax Case, 15 Wall., 277.

IV.

Plaintiff in error is obliged to furnish sleeping accommodations to travelers local to Mississippi as part of its interstate business, and therefore cannot carry on interstate business without subjecting itelf to this privilege tax.

Sec. 195 Mississippi Constitution of 1890.
Nevin v. *Pullman Co.*, 106 Ill., 222.
Elliott on Railroads, § 1617.

V.

The court will examine to see if applying a full license tax for accommodating a single local passenger on an interstate car is not done to evade the federal constitution and is not really a tax on interstate commerce.

Crutcher v. *Kentucky*, 144 U. S., 47.
U. S. Express Co. v. *Allen*, 39 Fed. Rep., 712.
Austin v. *Tenn.*, 179 U. S., 343.
Morgan v. *Louisiana*, 118 U. S., 455.

ARGUMENT.

THE OPERATION OF THE SLEEPING CARS AND THE BUSINESS IN WHICH PLAINTIFF IN ERROR IS ENGAGED IN MISSISSIPPI CONSTITUTE INTERSTATE COMMERCE AND THEREFORE THE STATE CANNOT CALL SUCH BUSINESS A PRIVILEGE AND IMPOSE A PRIVILEGE TAX THEREON.

In this case the business of plaintiff in error and its relations to the railroad companies are exactly the same as those shown in *Pickard* v. *Pullman Co.*, 117 U. S., 34, and it was there held to be engaged in interstate commerce.

The Tennessee statute in that case required the sleeping-car company "to pay to the comptroller by the first of July following $50 for each and every of said cars or coaches used or run over said railroads." As soon, therefore, as any sleeping-car went upon a road in Tennessee, it was required to pay $50 for the privilege of so doing.

In the present case it appears that sleeping-cars are operated over six or seven different railroads in Mississippi. As soon as a passenger demands sleeping-car accommodations between any two points in Mississippi, the law requires that such accommodations be furnished him, and thereupon the taxing act immediately takes effect, and plaintiff in error is required to pay certain privilege taxes, not measured by amount of business or amount or value of its property The entire tax is in force if only one dollar is realized from the business. If therefore a single passenger so demands accommodations on the Mobile & Ohio Railroad, there immediately springs up a privilege tax, payable in cash and on mileage, reckoned not only on the Mobile & Ohio Railroad,

but on the other six railroads on which sleeping-cars are operated.

This tax therefore is clearly a privilege or license tax, not in any way dependent on the amount of business done, the receipts from such business or the value of the property engaged in such business.

By the terms of the Tennessee act and also by the terms of the Mississippi act, the tax was distinctly declared to be a privilege tax. In the declaration in this case, in speaking of the time for which taxes are claimed, it is stated that:

"During all of said time there was imposed by law in Mississippi a *privilege* tax for each and every of said years."

In the case at bar the tax is not upon the property of plaintiff in error in Mississippi, nor upon a part of the property of plaintiff in error proportioned to the mileage in Mississippi, nor can it be, in any sense, called a property tax. Neither is it a tax upon receipts arising from business wholly within or without the state. It is purely and simply a license tax with a penalty provided for noncompliance. It does not pretend to be guaged by the amount of property or the amount of business done. The receipt of one dollar as a charge between two stations local to Mississippi, at once imposes the entire tax sued for, and that dollar must be accepted if tendered, even although it be tendered by an agent of defendant in error for the purpose of making plaintiff in error liable for the license fee. The arbitrary imposition of this tax if, as incidental to interstate business, a dollar is accepted from an interstate passenger, as surely and necessarily imposes a tax on interstate commerce as if the tax were imposed on any sleeping-car company that should, while crossing Mississippi, buy kerosene to fill the lamps in the sleeping-cars or coal to replenish the heaters.

In *Pickard* v. *Pullman Co.*, 117 U. S., 34, the court con-

sidered the distinction between a license or privilege tax and a property tax, and, while holding that privilege or license taxes in that case were invalid, yet said that a tax might be laid upon property having a *situs* for taxation in a particular State, even although that property was engaged in interstate commerce.

Therefore there is not involved in this case those decisions of this court which refer to taxes upon receipts from business, or to taxes which are a certain percentage upon receipts from local business where such receipts can be ascertained and separated from gross receipts. *Adams Express Co.* v. *Ohio,* 165 U. S., 220. Neither is there involved the doctrine of other cases in this court where it has been held that a part of the total property of a company engaged in interstate commerce, bearing the same proportion to the total property of the company that the business done in the state bears to the total business done by the company, may be taxed by such state, *American Refrigerating Co.* v. *Hall,* 174 U. S., 70; nor the action of a state in taxing a portion of the capital stock of such company proportioned to its business done in the state. *Pullman Co.* v. *Penna.,* 141 U. S., 18.

In the case at bar we have simply an arbitrary tax against plaintiff in error without regard to the volume of business done in Mississippi or the value of the property used in doing that business. It is an arbitrary tax, really directed at interstate commerce and imposed upon interstate commerce and which cannot be avoided by that commerce.

In *Pullman Co.* v. *Pennsylvania State,* 141 U. S., 25, the court held the tax good *because it was not a tax on business* or occupation but on a part of the capital stock of the corporation proportioned to the property of the company within the State, and therefore a *property tax.*

In several cases this court had held there was an important distinction between a tax upon property and a tax upon the privilege of doing business.

In *Postal Telegraph Co.* v. *Adams*, 155 U. S., 688, a privilege tax was sustained because it was a tax imposed,

"*In lieu of all others*, as a privilege tax, and *its amount is graduated according to the amount and value of the property* measured by miles. It is to be noticed that *it is in lieu of all other taxes*, state, county, municipal. * * * This exposition of the statute brings it within the rule where *ad valorem* taxes are compounded or commuted for a just equivalent determined by reference to the amount and value of the property" (pp. 697-8).

The court then said that the tax was thereby brought within the rule of the property tax cases and was not really a privilege tax. On page 696 the Court said:

"But *property* in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation *on account of its property* within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, *if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State*, (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon,) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

The third plea, to which a demurrer was sustained and evidence to support which was afterwards ruled out, set up that the sleeping-car fares received from persons riding from one point to another in Mississippi, did not equal the additional expense of having to provide accommodations for that business and that the deficit thus arising operated as a burden upon its interstate business.

The fact that the legislature sought to make the license tax

depend upon the receiving on the cars an intra-state passenger (which is a necessary incident to the interstate business) cannot save the tax or make it valid. In *Crutcher* v. *Kentucky*, 141 U. S., 47, the court, in holding a license tax invalid, said (p. 59):

"We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business, (which is to carry goods between different States,) does also some local business by carrying goods from one point to another within the State of Kentucky. This is, probably, quite as much for the accommodation of the people of that State as for the advantage of the company. * * * These regulations are clearly a burden and a restriction upon that commerce. *Whether intended as such or not they operate as such.* But taxes or license fees *in good faith* imposed exclusively on express business carried on wholly within the State would be open to no such objection."

In the *Pickard* case the court held the tax void because it was an interference with interstate commerce. In the statement of facts we find the following:

"The same cars also *transported passengers from points in Tennessee to other points in that State* whenever they properly applied for such transportation, but the number of such passengers *bore an inconsiderable proportion to the other passengers* transported in those cars; that those cars ran into, out of or across Tennessee, making such stops as the trains to which they were attached made."

"The plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable by way of license or privilege."

To sustain a tax levied upon both kinds of traffic there must be a possibility of separating the two and levying a fair tax upon the intra-state traffic. Such intra-state traffic must be in itself a basis or reason for the tax. It is a violation of the constitution for a state to tax anything because of its relation to interstate commerce.

If the interstate business and the local business upon which only the tax could be sustained, are necessarily so mixed as to preclude separation, a tax thereon is invalid.

Ratterman v. *Western Union T. Co.*, 127 U. S., 411.

In *Leloup* v. *Port of Mobile*, 127 U. S., 640, there had been laid a yearly "license tax" of $225 on telegraph companies and a fine was provided for any violation of the act imposing the tax. The court found that there was imposed upon the telegraph company in addition to the license tax, taxes on its property and also a tax of three-fourths of one per cent. on its gross receipts within the state (p. 645). These latter taxes were not complained of and the court, in holding the license tax invalid, expressly said that such holding

"does not prevent the State from taxing the *property* of those engaged in such commerce located within the state as the *property of other citizens* is taxed" (p. 649).

The court then held that "the tax is not laid upon individual messages, but it is laid on the occupation, or the business of sending such messages" (p. 646).

"But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. *But that fact does not remove the difficulty. The tax affects the whole business without discrimination.* There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company" (p. 647).

In *Lyng* v. *Michigan*, 135 U. S., 166, the Court said:

"We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or *on the occupation or business of carrying it on*, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to

Congress. *Leloup* v. *Mobile,* 127 U. S., 640, 648, and cases cited".

In *State Freight Tax case,* 15 Wall., it is said on page 277:

"The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State".

Judge Key in *U. S. Express Co.* v. *Allen,* 39 Fed. Rep., 712, said:

"It is essentially a license or privilege tax. There is no description of or limitation of the business. It makes no difference whether it be interstate or intra-state. If it be an Express Company it is taxed".

These cases and numerous others before and since in accord with them, have never been in any way overruled or doubted and do not conflict with the decisions of this court that where a company is engaged in interstate commerce, a part of its property, proportioned to its use in any one State, can be taxed by that State, or that a tax can be placed upon the receipts from that part of the business which is entirely local to the State. Such taxes are *property taxes* as distinguished from license or privilege taxes. They are put on an *ad valorem* basis. Although they may sometimes bear to a slight extent on interstate commerce, they never can control it, while a license or privilege tax relating in any way to interstate commerce or those engaged in it, if valid at all, can quickly be made prohibitive.

The doctrine of *Leloup* v. *Mobile, Lyng* v. *Michigan, Pickard* v. *Pullman Co.* and many other cases before and since is that interstate commerce, *with all its necessary incidents,* cannot be taxed or regulated in any way by a State. This is the general rule, and other cases allowing taxation on a proportioned property basis are but exceptions to the

general rule so long established and adhered to, and, as exceptions, must be strictly kept within the exact principle of those cases. The general rule has never been doubted.

The case of *Osborne* v. *Florida*, 164 U. S., 650, has been cited in support of this tax. We submit, however, that that case differs radically from the case at bar. In that case the business involved was that of an express company. The basis of the opinion is that the express company could engage in interstate business only, and then the act would not apply to it. Moreover, the supreme court of Florida had passed upon the revenue act in question and had given it a construction which this Court accepted as binding. By the construction so given by the Florida court, the tax was directed against local business only, and the express company could have been engaged in interstate business alone without being subject to the tax. But the plaintiff in the case at bar is engaged in an interstate business that necessarily involves some local business. We have not in the case at bar any decision of the supreme court of Mississippi that plaintiff can in any way evade the necessity of paying this license tax.

The main idea of *Osborne* v. *Florida* is contained in that part thereof which, speaking of the express company, says:

"It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the state".

In the present case the plaintiff in error could not decline local business and therefore the principle of *Osborne* v. *Florida* does not apply.

In *Osborne* v. *Florida* it is said that if the Florida statute applied to interstate business it would be void. The opinion does not criticise the case of *Crutcher* v. *Kentucky*, 141 U.

S., 47, but distinguishes it. It does not overrule any of the cases on which we rely. In fact the case of *Osborne* v. *Florida* is based almost solely upon the peculiar construction given to the revenue act of that state by the Florida supreme court.

The late cases of *Vance* v. *Vandercock,* 170 U. S., 438; *American Refrigerating Co.* v. *Hall,* 174 U. S., 70, and *Austin* v. *Tennessee,* 179 U. S., 343, which discuss interstate commerce and uphold the right to levy a property tax, do not in any way question or doubt the decisions of this court on the subject of privilege or license taxes, but by implication, and in some cases directly, quote and approve the decisions on property taxes.

Looking strictly to its words, there is nothing in the statute to indicate the taxing of a local business except the words used to designate the character of companies taxed, being those "carrying passengers from one point to another within the state," which apply as well to companies engaged only in interstate commerce within the state, since such companies must necessarily carry their passengers from one point to another in Mississippi.

It is not sticking in the bark to say that the defendant is not subject to the tax because it does not, to quote the statute, "run its cars" over any miles of railroad in Mississippi or elsewhere. The railroad "runs" the cars. Then, too, the statute provides that the tax shall be upon sleeping-car companies "carrying passengers from one point to another." Plaintiff in error does not carry any passengers. It is not a carrier, as is shown later in this brief. Therefore the act cannot apply to it. The statute is of a kind to be strictly construed.

In this connection we invite attention to the difference

between the code provision in force at the time the tax complained of was imposed, and the privilege tax law of 1898, inadvertently quoted by the state supreme court in its opinion. In the former the twenty-five cents per mile is laid on all the miles over which the sleeping-car companies run their cars without reference to the boundaries of the state, while in the latter it is laid only on the miles over which they run them in the state of Mississippi. Section 74 of the Mississippi privilege law of 1898 is as follows:

"Sec. 74. Sleeping-cars.—On each sleeping and palace car company carrying passengers from one point to another in this state, $200.00. And in addition thereto, 25 cents a mile for each mile of railroad over which the company runs its cars *in this state.*" Laws pp. 24-25.

The fact that the revenue agent saw fit to sue only for the tax on the number of miles in Mississippi does not in any wise alter the statute, which measured the tax by the company's mileage without as well as within the state, thus negativing the idea that only the local business was taxed by subjecting to the tax the company's whole mileage, or, in other words, its whole business.

Plaintiff in error is obliged to furnish sleeping accommodations to travelers local to Mississippi as part of its interstate business and therefore cannot carry on interstate business without subjecting itself to this privilege tax.

The Illinois Central Railroad Company clearly has a right to run through trains from Chicago to New Orleans, traversing the entire length of Mississippi, and Mississippi cannot interfere with or burden such interstate commerce. Passengers on such trains would pay the railroad company a charge for transportation and the Pullman company a charge for sleeping accommodations. All the charges would be for

one transaction, according to *Pickard* v. *Pullman Co.*, 117 U. S., 34.

Indeed Mississippi concedes such to be the case and endeavors to seem to avoid interference with such commerce by providing that this privilege tax shall only spring into effect when a passenger is carried from one to point to another in Mississippi. The sole purpose and desire of the Illinois Central Railroad Company may be to carry through passengers on sleeping-car trains from Chicago to New Orleans. It may desire and hope that it will not be required to carry any local passengers. If, however, by the common or statute law of Mississippi, through trains are required to receive local passengers and furnish them with sleeping-car accommodations, such law must be obeyed. Obedience to such requirement of Mississippi cannot be made the basis for inflicting a privilege tax upon that interstate commerce. If a railroad company having a short run in Mississippi, such as by the record the Memphis & Charleston Road is shown to have, did not wish to stop in Mississippi and did not wish to receive any local passengers and wished only to pass through the state in conducting interstate commerce so far as its sleeping-cars were concerned, the state of Mississippi could not pass a law requiring that company to stop at least once a year and receive upon the train at least one passenger local to Mississippi and give him sleeping accommodations, and then by another act provide that whenever such passenger was so received, a privilege tax of $3,000 a year should be paid by the sleeping-car company. Yet that is what is substantially done in this case.

The first and greatest duty of a common carrier is to accord accommodations equally to all parties who properly apply therefor. It was in recognition of such a principle

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and to secure its enforcement that Mississippi, by section 195 of its Constitution of 1890, provided that:

"Express, Telegraph, Telephone and sleeping-car Companies are declared common carriers in their respective lines of business and subject to liability as such."

This was evidently intended to require the companies enumerated to furnish the service in which they were engaged equally to all parties properly applying therefor. By the adoption of that provision of its Constitution, Mississippi required sleeping-car companies to furnish sleeping accommodations to local passengers. It then followed that provision of the Constitution with the enactment of 1892, which substantially provided that whenever a sleeping-car company, though engaged and wishing to engage only in interstate commerce, as an incident to its interstate business rendered necessary and obligatory by the Constitution of 1890, accommodated a single passenger from one point to another in Mississippi, it should thereupon pay a certain privilege tax not proportioned to property or receipts, and the amount of which was therefore wholly in the discretion of the legislature and might be prohibitive. We can readily imagine a case where through interstate traffic in limited sleeping-car trains having no desire to take any local passengers in Mississippi, could be compelled to receive such a passenger in Mississippi and on receiving a single passenger should thereby become liable to pay an enormous privilege tax that would have the effect of stopping such interstate commerce entirely.

In the present case we pleaded and sought to prove that this local sleeping-car traffic, forced upon us by Mississippi, was conducted at a loss and was now a burden upon the interstate traffic.

Even without the provision of the Constitution of 1890

it is probable that the sleeping-car company would be obliged as a necessary incident of its other sleeping-car business, to accept local passengers. The Pullman Company is not a common carrier. In discussing its liability for a theft from a passenger on its car, it is said in *Pullman Co.* v. *Smith*, 73 Ill., 360, 365:

"The peculiar liability of the innkeeper is one of great rigor, and should not be extended beyond its proper limits. We are satisfied that there is no precedent or principle for the imposition of such a liability upon appellant.

"Appellant is not liable as a carrier. It made no contract to carry. Appellee was being carried by the railroad company."

The same principle is laid down in *Pullman Co.* v. *Gavin*, 93 Tenn., 53, and in many other cases, state and federal, quoted in *Elliott on Railroads*, sec. 1616.

In *Nevin* v. *Pullman Co.*, 106 Ill., 222, a question arose as to the duty of the Pullman Company to afford sleeping-car accommodations to a party who properly applied therefor, and it was held that although a sleeping-car company was not a common carrier, yet it was engaged in a public employment on railroads which were operated under public franchises, that it owed a duty to all the public alike and that it must receive into its cars all persons who properly applied for accommodations.

Elliott on Railroads, sec. 1617, states the same doctrine and cites many authorities in support thereof.

The answer to this position made by the supreme court of Mississippi in the closing paragraph of its opinion (pr. rec. p. 18) is too fallacious to need comment. It attempts to escape this conclusion by saying that if Mississippi has encroached upon the interstate commerce clause of the Constitution, in the manner above indicated, it is by the provision of the constitution of 1890, making the sleeping-car

company a common carrier, and not by the license tax statute. A sufficient answer to this ought to be that the court cannot thus uphold the tax by merely supposing that the constitution is unconstitutional. But the provision of the constitution of Mississippi, in so far as it relates to plaintiff in error, is not necessarily unconstitutional and we are not complaining of it. It may be proper that all sleeping-car companies should be declared common carriers. Neither side to this controversy is asking the court to hold the provision of the constitution of 1890 unconstitutional. It stands as a law recognized by both sides.

But this provision of the Mississippi license act seeking to make the business liable to a heavy tax if only a single passenger tenders fare for intra-state accommodation, is but a subterfuge to evade the interstate commerce clause of the Constitution.

In *Crutcher* v. *Kentucky*, 141 U. S., 47, it is said (p. 58):

"It is well settled by numerous decisions of this court, that a State cannot under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits."

"We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

In *United States Express Co.* v. *Allen*, 39 Fed. Rep., 712, the court, in speaking of such a provision in a revenue act, said:

"But is not this provision of the statute a mere device to fasten the tax upon the company? It is no exercise of the police power of the state. If the tax be paid, it makes not the slightest difference whether the packages taken up and carried and delivered between and at points in the state

be one or a million. It is not a tax regulated by the amount of business. It is as much if one package be carried as if ten millions go. A package of a dime in value, carried five miles, may involve a license fee of $1,000 or $3,000, depending altogether on the length of the line of transportation used by the company".

In *Austin* v. *Tennessee,* 179 U. S., 343, the court said:

"Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution" (p. 350).

"We endorse fully what was said by this court in *Mugler* v. *Kansas,* 123 U. S., 623, 661: 'If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby to give effect to the Constitution' " (p. 344).

In *Morgan* v. *Louisiana,* 118 U. S., 462, the Court said:

"When the question is raised whether the state statute is a just exercise of state power, or is intended by roundabout means to invade the domain of federal authority, this court will look into the operation and effect of the statute to discern its purpose."

In whatever language a statute may be framed, its purpose and its validity under the interstate commerce clause of the federal constitution must be determined by its natural and reasonable effect.

Henderson v. *New York,* 92 U. S., 259, 268.

The test in such a case is upon what does the burden really rest? The tax is not valid because laid upon local and domestic as well as interstate traffic.

Case of the State Freight Tax, 15 Wall., 232, 272.

It is sometimes said that a state is entitled to impose a tax on account of the protection it accords to the instrumentalities of interstate commerce. As between different countries this may be so, as between states bound by the same federal constitution, it is not so. There is a certain reciprocity necessary between the states. This court at one time stopped Colorado from levying a dollar a head on persons crossing the state. It was then argued that such passengers were under the protection of the laws of Colorado while in that state and should pay for it. The relations of the different states to each other under the federal constitution are such that a citizen of one state has a right to demand protection of the laws of a neighboring state while in it. So business and freight can be transported across a state without stopping and it would not be seriously contended that it could be taxed. Yet it would be protected during such transit. The account between any two states concerning the protection afforded to the citizens and property of the other while passing through it may not be evenly balanced for any one month, but in the long run the account is about balanced, and whether it is or not the federal constitution contemplates that there shall be reciprocity in the protection afforded by one state to another both over citizens and property. The argument is therefore fallacious that a state acquires a right to tax either a person or his property simply because they pass through that state and are temporarily under the protection of its laws.

There is no distinction in principle between persons and property. If there is reciprocity between the States in the protection of each other's citizens, there is also in regard to property. If the intercourse between States is that of wholly independent nations, the claim of right to tax may be good.

but it should be allowed equally on persons and property. If the Constitution of the United States has abolished foreign lines between the States and given reciprocal rights to the citizens of the States, those rights must apply to their property also, and in the end the protection ledger will balance throughout the whole nation.

J. S. RUNNELLS,

WILLIAM BURRY,

Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

No. 138.

THE PULLMAN COMPANY, *Plaintiff in Error*, *vs.* **WIRT ADAMS, State Revenue Agent**, *Defendant in Error.*	Error to Supreme Court of Mississippi.

PETITION FOR REHEARING.

Plaintiff in error respectfully presents this petition for rehearing, because it believes that sufficient consideration has not been given to parts of its argument and its position as to the provision of the Mississippi Constitution that was therein involved and discussed.

Whether the Pullman Company is obliged to accept local passengers upon its cars operated interstate seems to be the question upon which the opinion turns. The opinion concedes that if plaintiff in error is bound to receive such local passengers on its through cars, then the tax is invalid.

In our argument we submitted to the court that the Pullman Company is bound, both by common law and under a provision of the Mississippi constitution, to accept through passengers on its interstate cars. The effect of the provision of the Mississippi constitution is considered in the opinion, but no notice is taken by the court of the position advanced by us, that the Pullman Company is bound at common law to accept local passengers upon its cars, operated interstate.

I.

PLAINTIFF IN ERROR IS OBLIGED BY THE MISSISSIPPI CONSTITUTION TO ACCEPT LOCAL PASSENGERS.

We wish first to call the court's attention again to the provision of the Mississippi constitution. It is:

"Section 195. Express, telegraph, telephone, and sleeping-car companies are declared common carriers in their respective lines of business, and subject to liability as such."

The tax act complained of imposes a privilege tax on every sleeping car company that accepts a passenger from one point to another within the state.

The position advanced by us in our original argument was that the state constitution requires plaintiff in error to furnish sleeping car accommodations to all passengers who properly present themselves and demand such accommodations between points in Mississippi, and that thereupon the tax act referred to imposes a tax. The result of the operation of the combined action of the constitution and the statute is that a sleeping car company entering the state of Mississippi, while engaged in interstate commerce, is *first compelled* to furnish accommodations between points within

that state, and is then to pay a privilege tax for so doing. From this result there seems to be no escape.

In its opinion the court says:

"If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the state constitution and the statute combined would impose a burden on commerce between the states analogous to that which was held bad in *Crutcher* v. *Kentucky*, 141 U. S. 47."

The question, as the court states, is whether the effect of the constitution is to impose on the plaintiff in error the obligation to furnish sleeping-car accommodations to passengers between points in Mississippi. If so, then the tax would be invalid. The opinion states that this point is not decided by the Supreme Court of Mississippi, but that that court has thrown out "intimations" on the subject.

The opinion of the Mississippi court is short, and, exclusive of the quotations of the tax act and parts of the opinions in *Osborne* v. *Florida*, 164 U. S. 650, and *Adams* v. *Telegraph Co.* 71 Miss. 565, is as follows (pr. rec. 16):

"The whole purpose of the statute, from its terms manifestly is, to require a privilege tax to be paid for doing business within this State, and for that business alone. It relates exclusively to the local business done by the Pullman Company within this state. It does not require any tax to be paid for the privilege of doing the interstate business of the company. It does not in any manner affect its interstate business."

"The contention that the appellant does its local business at a loss, and yet must do it under the constitution of 1890 making it a common carrier, and hence that its interstate business is indirectly burdened is fallacious. Were that so, it would be the provisions of law declaring the sleeping car companies common carriers, that would contravene the interstate commerce clause of the Constitution—not this

license-tax statute. It is not for the appellant to get all out of the local business the traffic will bear and then escape the correlative burden of this license tax, by pleading that it, though conforming to the law making it a common carrier, as to profits, should not conform to the law taxing the business it does wholly local, and entirely within this state. *Pickard* v. *Pullman,* 117 U. S. 34 is wholly unlike this case. There a tax was levied on each sleeping car, whether in state, or interstate business and the tax was required to be paid if the local business had been entirely abandoned."

In this short opinion and in the references to the *Osborne* case must be found the "intimations" referred to.

We beg the court to re-examine the opinion of the Supreme Court of Mississippi, Record pages 16 and 18. With all due respect we would suggest that the opinion contains no intimation that the Mississippi Court will not insist that the constitution requires the Pullman Company to furnish accommodations to passengers between local points in the State of Mississippi, even though such local business is not desired, and thus subject the company to the tax.

The provision of the state constitution does not necessarily contravene the interstate commerce clause of the federal constitution. It may be operative as applied to a sleeping car company organized for and doing business only in Mississippi. But we cannot separate the state constitution and the state tax act in their effect upon the interstate commerce business in which plaintiff in error is engaged. The result of the state constitution and statute, taken together, is to interfere with interstate commerce as applied to plaintiff in error.

The opinion of this court takes the view that the plaintiff in error is free to renounce the local business, and intimates that if the constitution of Mississippi should be read as im-

posing an obligation to take local passengers and then the tax act impose a tax for so doing, either the clause of the constitution or the tax act, or both, are invalid. That is to say, if the plaintiff in error is not free to renounce the taking of local passengers, then the combined effect of the constitution and tax act in imposing this tax *upon plaintiff in error* is invalid.

It is not necessary, and we are not asking the court, to hold that the state constitution or the tax act, is invalid. We are only asking the court to hold that the tax thereunder, assessed against plaintiff in error, is invalid, because *in this case* it operates as a regulation of, or burden upon, interstate commerce.

But the state court opinion contains no intimation that the Mississippi constitution of 1890 is not intended to require plaintiff in error to accept local passengers. That opinion says that the contention that the Pullman Company must, under the constitution of 1890, accept local passengers, "and *hence* that its interstate business is indirectly burdened, is fallacious." The argument or contention must refer to what comes after the word "hence." A proper paraphrase of the sentence would be,

"Although the Pullman Company does its business at a loss and yet must do it under the constitution of 1890 making it a common carrier, still the argument therefrom that its interstate business is indirectly burdened is fallacious."

The evident meaning of the court is that although the Pullman Company is compelled, as a common carrier under the Mississippi constitution, to accept local passengers and thereby subject itself to a tax, yet that tax relates to the business of accommodating such local passengers, and its interstate business is not indirectly burdened. And further

the opinion intimates that were the interstate business burdened thereby, it would be the Mississippi constitution and not the license tax statute that would contravene the interstate commerce clause of the federal constitution.

The provision of the state constitution standing alone might be valid and also be harmless to plaintiff in error, and the wrong or burden might only arise when the statute was enacted. Both state constitution and statute might be valid as to certain local carriers, and their application to the interstate business of plaintiff in error only be invalid. If such is the case, this court is not called upon to hold that either the state constitution or the state statute is invalid, but only that they cannot be applied to the business of plaintiff in error in such manner as to impose the present tax upon that business.

There is no hint or intimation in the opinion of the Mississippi court that the provision of the Mississippi constitution will not be enforced against plaintiff in error as requiring it to accept local passengers. The reasoning of that opinion is rather that *the local business forced upon plaintiff in error is a distinct business and can be taxed as the state may direct.*

II.

PLAINTIFF IN ERROR IS OBLIGED, UNDER THE COMMON LAW, TO ACCEPT LOCAL PASSENGERS.

The Pullman Company is bound, without reference to the Mississippi constitution, to afford sleeping car accommodations to any person who properly applies therefor.

In *Nevin* v. *Pullman Co.*, 106 Ill., 222, the Pullman Company demurred to a declaration which alleged that it

had refused to receive a passenger who properly presented himself and offered to pay for sleeping car accommodations. The court held that the company must receive such passenger. In so holding the court, quoting from Chitty said, (pp. 228, 229):

"There are, however, some particular instances of persons exercising certain public trades or employments, who are bound by law to do what is required of them in the course of their employments without aid of express contract, and are in return entitled to a recompense, and may, therefore, be sued in case, as for a breach of duty in refusing to exercise their callings."

"It becomes important to determine, with some degree of particularity, the true relation which the Pullman Palace Car Company sustains to the public."

Mentioning the duties laid upon a railroad company to serve the public alike, the court said, (pp. 230-231):

"In what respect, then, does this company differ in its relation to the public, so far as the present inquiry is concerned, from an ordinary railway company? No difference has been pointed out by counsel, and we are confident none can be. Why, then, should not the same principles be held to apply to it that apply to common carriers, and others in like employments, in so far as their relation to the public is the same?"

"Indeed the running of these sleepers has become a business and social necessity. Such being the case, can it be maintained the law imposes no obligations or restrictions on this company in the discharge of its duties to the public?"

"If then this company owes any duties to the community by reason of its relation to the public, as we hold it does, manifestly one of them is, that it shall treat all persons whose patronage it has solicited with fairness, and without unjust discrimination. When, therefore, a passenger, who, under the rules of the company, is entitled to a berth upon payment of the usual fare, and to whom no personal objection attaches, enters the company's sleeping car at a proper time for the purpose of procuring accommodations, and in

an orderly and respectful manner applies for a berth, offering or tendering the customary price therefor, the company is bound to furnish it, provided it has a vacant one at its disposal."

In *Elliott on Railroads*, section 1617, it is said of sleeping car companies, that:

"they are under a duty to serve the public impartially and to exercise reasonable care to furnish the required service. There must be some public duty otherwise such public carriers as railroad companies would have no right to haul cars of sleeping-car companies as parts of regular railway passenger trains."

The case of *Attorney General* v. *London & N. W. Ry. Co.*, 6 Q. B. Div. 216, is commented on and quoted at length with approval, by this court in *Pickard* v. *Pullman Co.*, 117 U. S., on pages 46 and 47. It is there held that sleeping car accommodations are of as public a nature as is the carriage, and that the charges for carriage and for sleeping accommodations, are of the same character and must substantially be considered as one charge, thus putting the duty to furnish sleeping accommodations substantially on the same basis as the duty to furnish transportation.

This court quotes with approval the language of *Lord Coleridge* in saying:

"We regard the additional accommodation afforded by the sleeping carriages as differing in no essential particular from the superior accommodation afforded by a second-class carriage over a third, or by a first-class carriage over both. * * * The charge, though written on a separate ticket, is, in our opinion, part of the charge for the conveyance of the passenger in a particular way, and is, therefore, a part of the charge for the conveyance of a passenger, received and charged for such conveyance."

It is apparent that, regardless of the Mississippi constitution, a duty is imposed on The Pullman Company to fur-

nish its accommodations to all railroad passengers who properly apply therefor. The Company cannot escape this duty, where passengers properly apply for such accommodations, from one point to another within the State of Mississippi, whenever its cars are attached to trains which run through and stop at different points within that State. This is so even though the Pullman cars are engaged primarily in interstate commerce business.

The business in which plaintiff in error is engaged is of such a character that it cannot conduct its interstate commerce business without accepting passengers between places located in the State, as incident to its interstate business.

This Court in its opinion says, "The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." The fact would seem to be, however, that the Company is *not* free to renounce the local business.

Mississippi is a long state—over three hundred miles long. Some important towns in the northern part of it are nearly two hundred miles north of Jackson, the capital. Some places within the state are, therefore, a night's ride apart.

We submit it would not be competent for the Pullman Company, on trains running from Chicago to New Orleans or Mobile, to close the doors of its cars on entering the state of Mississippi and refuse to open them until the car passed out of the state. This could not be done because it might have passengers from outside of Mississippi, bound to points inside of the state. If a passenger should present himself, immediately after the sleeping car enters Mississippi from the North, the Pullman Company could not accept him as a passenger if he were bound for New Orleans and reject him if he wished to get off at Jackson or Vicksburg.

III.

THE TAX IS GAUGED BY AND IS A BURDEN UPON THE INTERSTATE BUSINESS OF THE PLAINTIFF IN ERROR.

We again urge upon the court that this tax is gauged by the interstate business done and has no relation to local business. The effect of furnishing accommodations to a single passenger on a single railroad line is to apply the tax on "each mile of railroad track over which the company runs its cars." The record shows that there are six or seven railroads passing through Mississippi, over which the cars of plaintiff in error run, two of the principal of which are the Illinois Central Railroad and the Mobile & Ohio Railroad.

The tax act takes effect upon the mileage of the Illinois Central Railroad Company, immediately upon accommodations being furnished a passenger between two local points on the Mobile & Ohio Railroad, although the Illinois Central trains pass through Mississippi without stopping and no passengers are accommodated. One hundred dollars is imposed and an additional twenty-five cents for each mile of railroad track, including the Illinois Central Railroad track, over which the Pullman Company does only an interstate business. The act does not provide for a tax of twenty-five cents per mile over the line of road on which a local passenger has been accepted. If a local passenger is taken on one line of road, then the tax is gauged by and is a burden upon every mile of railroad over which the Pullman Company transacts its interstate business, including that on which no local passengers were received.

We submit, therefore, that this constitutes an actual bur-

den upon interstate commerce. If the principle is once allowed, and the state is conceded the power so to tax, then the tax may be of any amount, and the interstate commerce operations of plaintiff in error could thereby be practically prohibited.

We submit that as the statute does not confine the tax to the road or roads on which local passengers are accommodated, but extends it to all roads and charges a certain rate per mile on all of them, it is unconstitutional as imposing a burden on interstate commerce.

And in this connection we again desire to call attention to the wording of the act of 1892, which is:

"A tax on privileges and levied as follows, to-wit,"

"3387. Sleeping-car Companies:—On each sleeping and palace-car company carrying passengers from one point to another within this state, one hundred dollars, and twenty-five cents per mile *for each mile of railroad track on which the company runs its cars.*"

It will be observed that the tax is laid upon *all* railroad tracks on which the company runs its cars. A new act was passed in 1898 to take effect from that time, which followed the wording of the old act and added the words, "in this state." But the act of 1892 would not be the first instance of a state attempting to levy a tax on the entire capital stock or the entire business, or the entire property of a corporation, simply because it was doing *some* business in that state.

This court has declared certain state laws invalid on the ground that the taxes imposed by such laws were laid upon interstate commerce. At times the state whose law was thus abrogated has then passed a new law intending to circumvent and defeat the decision of this court. The State of Mis-

sissippi, forbidden to levy a tax on the interstate commerce business of the plaintiff in error, seeks to enforce the same tax by so wording the law that the tax shall only be payable upon the contingency of a passenger being accommodated locally. As shown above, both under the provisions of the Mississippi constitution and under the general common law, the plaintiff in error cannot refuse local business, although it may wish to do so. The case at bar is an illustration of the methods employed to circumvent the provisions of the interstate commerce clause of the Federal Constitution. We would again respectfully call the attention of this court to the extracts from its own opinion condemning such subterfuges, in the cases of *Crutcher* v. *Kentucky*, 141 U. S. 47; *Austin* v. *Tennessee*, 179 U. S. 343, and *Morgan* v. *Louisiana*, 118 U. S. 462, as shown on pages 23 and 24 of our original brief.

For the reasons and considerations above shown, we respectfully ask the court to grant a rehearing in this cause.

J. S. Runnells,
William Burry,
Attorneys for plaintiff in error.

We hereby certify that the foregoing petition for rehearing is, in our opinion, well founded.

J. S. Runnells,
William Burry,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1902.

No. 138.

THE PULLMAN COMPANY, PLAINTIFF IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The Code of 1892, of Mississippi, in sec. 3387, in the general chapter levying privilege taxes, provides as follows:

> "On each sleeping and palace car company carrying passengers from one point to another within the State, one hundred dollars, and twenty-five cents per mile for each mile of railroad track over which the company runs its cars."

On Sept. 26, 1900, Wirt Adams, State Revenue Agent for Mississippi, brought this action in the Circuit court of Hinds

county against the Pullman Company, to recover such privilege tax for the years 1892, 1893 and 1894, under and by virtue of said provision. The plaintiff, in his declaration, alleged as follows:

> "That during the year 1892, and the year 1893, and the year 1894, the said defendant being a sleeping car company as aforesaid, operated and ran its sleeping and palace cars over and upon two thousand miles of railroad track in the State of Mississippi, upon various lines of railroad therein, and then and there offered to take and took passengers for hire upon its said sleeping or palace cars and carried them from various towns in Mississippi along its route to other and various towns in Mississippi (said traffic being wholly within the State), and so defendant carried passengers for hire upon its sleeping and palace cars from one point to another in the State of Mississippi."

The defendant pleaded the general issue and two special pleas, numbered in the record two and three. Demurrers were sustained to these two special pleas. The second plea seeks to justify the non-payment of this privilege tax on the ground that the defendant had no property nor resident agents in the State, and that it was at the same time carrying on an interstate commerce business of like kind and character, to which the local business was a mere incident. The third plea sets out the foregoing, and in addition that defendant carried on its local business at a loss, and that it was compelled to carry on such local business by the Constitution of Mississippi, which declares sleeping car companies to be common carriers. This provision (sec. 195, Constitution of 1890) is as follows:

> "Express, telegraph, telephone and sleeping car companies are declared common carriers in their respective lines of business, and subject to liability as such."

Under the plea of the general issue the cause was submitted on an agreed statement of facts, upon which the lower court instructed the jury to find for the plaintiff, first having excluded all of the evidence offered by the defendant as being an insufficient defense under the general issue. This agreed statement of facts is in part as follows:

"It is agreed between the plaintiff and the defendant in the above styled cause that for and during each of the years 1892, 1893 and 1894, the defendant's sleeping cars were carried by various railroad companies over 1536 miles of railroad track within the State of Mississippi, that such sleeping cars were under the control of the defendant, by its conductors and other employees, and that the defendant offered to take and took passengers in each of said years over said distance of said track in Mississippi, for hire, in this: That it collected fares for berths and seats upon its said sleeping cars from point to point wholly within the State of Mississippi, persons going from one point to another point within Mississippi. That the fares went to the defendant and not to the said railroad companies, who only carried such sleeping cars of defendant under a contract with it.

"That the defendant has never paid any privilege tax or had any privilege license for any of said years to the State of Mississippi. The defendant was incorporated under the laws of Illinois as the 'Pullman's Palace Car Company,' and as a sleeping car company, and that by act of the Legislature of Illinois its name was changed in 1899 to that of the 'Pullman Company,' which is its present name, both being the same corporation. No point is to be made, however, on the name. That defendant was the only sleeping car company doing business in Mississippi during said years. That upon the trial of said cause in said court the de-

fendant offered evidence to show that its receipts from persons going from one point in Mississippi to another therein, did not equal during said years its expenses properly chargeable against such receipts. To the introduction of such evidence the plaintiff objected, and his objection was by the court sustained, and that defendant then and there instantly excepted, and its exceptions were allowed."

Thereupon final judgment was entered for the plaintiff, and defendant appealed to the Supreme Court of Mississippi, where the judgment of the lower court was affirmed. Whereupon the defendant, the Pullman Company, appealed to this court.

ARGUMENT.

I.

At the outset we desire to concede that the tax levied by the provision under discussion, is a tax levied on the business and not on the property of plaintiff in error; that it is a license or privilege tax, and not a property tax. We concede further, that if this tax had been levied generally on the business of sleeping car companies, without discrimination or limitation, that it might have been unconstitutional, under the decisions of this court. We concede further, that if this tax on the local business had been levied in such form and manner that a company carrying on an interstate business, of like kind and character, would necessarily become liable to pay the local tax by virtue and in consequence of undertaking to carry on its interstate business, then such tax would be unconstitutional. But we insist that no such case is here presented. By express terms of the statute, and by the interpretation given to it by the highest tribunal in the State, in this very case, the tax is confined and limited to and imposed on the local business, alone, of sleeping car

companies. And by the application given to the statute by the Supreme Court of the State, all the plaintiff in error had to do to avoid the tax was to decline to receive passengers going from one point to another within the State. Nor is there anything in the nature of the business done by plaintiff in error, nor in the form and manner in which the tax is levied, that would prevent it from separating and segregating the one from the other, its interstate from its local business, and continuing either or both as it saw fit.

We do not believe that any case, either Federal or State, can be found denying the right of a State to require a privilege license of a foreign corporation to do a purely local business, even though such corporation may, for the most part, be engaged in an interstate business of like character and kind, where the tax so levied is confined strictly to the local business, either by the express terms of the statute, or by the construction of the courts.

We insist that the case of *Osborne v. Florida*, 164 U. S., 650, is conclusive of all of the serious contentions urged in this case. In that case, it was shown that the State of Florida had imposed a license or privilege tax on "all express companies doing business in this State," and the agreed statement of facts is in part as follows:

> "That the said F. R. Osborne is the agent of the Southern Express Company, and that said company is a corporation created, existing and being under the laws of the State of Georgia; that said Southern Express Company is doing a business in the State of Florida ordinarily done by express companies in the United States of carrying goods and freight for hire from points within the State of Florida to points in said State, and also of carrying goods and freights for hire from points within the State of Florida to points without the State of Florida in other States in divers parts of the United States, and in carrying goods and freight

for hire from points in other States of the United States to points within the State of Florida, and that it has been engaged in such business for more than twenty years, and was so engaged on the 3d day of October, 1893; that of the business done by the Southern Express Company 95 per cent. thereof consists of traffic carrying of goods and freights from the State of Florida into other States, and bringing and carrying from other States of the United States to points within the State of Florida, and 5 per cent. thereof consists of carrying goods and freights between points wholly within the State of Florida; that F. R. Osborne did knowingly act as the agent of said Express Company on the 3d day of October, 1893, in the city of Jacksonville, Duval county, Florida, a city having more than 15,000 inhabitants, the said Southern Express Company having then and there failed and refused to pay the license tax as required by article 12, section 9, of an act entitled, 'An act for the assessment and collection of revenue,' of the laws of Florida, approved June 2, 1893; that the Southern Express Company does business in and has agents in more than one town in nearly every county in the State, and that said towns differ in population, and that it has an office, an agent and does business in Polk county, Florida, in the following incorporated towns, with a population as follows: * * *"

Upon which this court said:

"The Supreme court of Florida has construed the ninth section of this act and has held in express terms that it does not apply to or affect in any manner the business of this company which is interstate in its character; that it applies to and affects only its business which is done within the State, or is, as it is termed, 'local' in its character, and it has held that under that statute so long as the express company confines its oper-

ations to express business that consists of interstate or foreign commerce, it is wholly exempt from the legislation in question. It has added, however, that under the provision of the statute, if the company engage in business within the State of a local nature as distinguished from an interstate or foreign kind of commerce, it becomes subject to the statute so far only as concerns its local business, notwithstanding it may at the same time engage in interstate or foreign commerce. In other words, this statute as construed by the Supreme court of Florida does not exempt the express company from taxation upon its business which is solely within the State, even though at the same time the same company may do a business which is interstate in its character, and that as to the latter kind of business the statute does not apply to or affect it. As thus construed we have no doubt as to the correctness of the decision that the act does not in any manner violate the Federal Constitution.

"The case of *Crutcher v. Kentucky*, 141 U. S., 47, is not in the slightest opposed to this view. The act which was held to be in violation of the Federal Constitution in that case prohibited the agent of a foreign express company from carrying on business at all in that State without first obtaining a license from the State. The company was thus prevented from doing any business, even of an interstate character, without obtaining the license in question. The act was held to be a regulation of interstate commerce in its application to corporations or associations engaged in that business, and that subject was held to belong exclusively to national and not State legislation.

"It has never been held, however, that when the business of the company which is wholly within the State, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the

State of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the State statute. It was stated by Justice Bradley, in the course of his opinion in the Crutcher case, that: 'Taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection,' viz., an objection that the tax or license was a regulation of, or that it improperly affected interstate commerce. We have no doubt that this is a correct statement of the law in that regard. The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the State whatever unless upon the payment of the fee or tax. It was said as to those cases that as the law made the payment of the fee or the obtaining of the license a condition to the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and therefore void. Here, however, under the construction as given by the State court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the State.

"The company in this case need take out no license and pay no tax for doing interstate business, and the statute is therefore valid."

There is nothing in the business of sleeping car companies to differentiate it from the business of express companies so far as the taxing power is concerned. Surely it cannot be

seriously urged, that merely because a local business is carried on by transient and shifting instead of resident agents, and that it is carried on without the aid of fixed and tangible property that can be reached by ordinary methods of taxation, and that it maintains no local office and has no local habitation, yet persistently and continuously receives the protection of the laws and accepts the money of the people, with whom, and amongst whom it transacts such local business, can give it any higher right to exemption from such taxation, than its neighbor who becomes a part and parcel of the people upon whom it lives and prospers. We find no warrant for any such distinction in any judicial decision. Certainly there is nothing in the case of *Pickard v. Southern Car Co.*, 117 U. S., 34, so much relied upon by plaintiff in error to justify such contentions. It will not do to take an isolated sentence from an opinion, separate it from the context, and without having in view the facts of the particular case about which the court is always presumed to be talking, to construct an elaborate theory, as the plaintiff in error seeks to do in considering the effect of the Pickard case. It is true that Judge Bradley does say in his opinion in that case, "and the plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable by way of license or privilege." But this is but a part of the clause relating to the matter, and when the entire clause is read the meaning of this able Judge is at once made clear and explicit. The preceding part of this sentence to which the latter half refers and relates, is as follows: "As such vehicle of transit, *the car so far as it was engaged in interstate commerce*, was not taxable by the State of Tennessee, because the plaintiff had no domicile in Tennessee, and was not subject to its jurisdiction for purposes of taxation, and the plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable by way of license or privilege." The words italicized by us denote the pith and

point of the whole opinion, and make clear the meaning of the Court.

But at last the force and effect of a decision is determinable by the facts of the particular case, and the language of the opinion is restrained and limited thereby. A careful examination of that case will show that the act there under consideration sought to impose a tax of $50.00 upon each and every car operated by a sleeping car company, whether such car was engaged in local or interstate business. Since no distinction was made between cars used in carrying on local business and cars used wholly or partly in carrying on interstate business, it was impossible under that act for the sleeping car company to operate a single car for carrying on its interstate business without becoming liable to pay this privilege tax, since the tax was so much *per car*, without regard to what kind of business it was engaged in. This Court properly held that the act imposed a tax on the business and not a tax on property, and as no distinction was made in cars used in carrying on interstate and local business, that it was directly a burden on and taxation of interstate commerce, and therefore unconstitutional. Under the terms of this act imposing this tax at so much per car without any further limitation or restriction, if the company had discontinued its local business entirely it would have been liable for the license on every car operated by it in carrying on its interstate business. It will be further noted from the statement of facts in this case, that there were three cars operated by said company between Memphis and Nashville, which were operated solely in the local business, and the company paid this license, on these three cars, without question.

That case cannot affect the case at bar, for under the act now under consideration no license is required, if no local business be done. The act itself separates and differentiates the two classes of business, clearly and distinctly.

II.

But it is said that defendant carried on its local business at a loss, and that by the Constitution of Mississippi it is declared to be a common carrier, and hence is first compelled to do the local business, which is done at a loss, and then to pay a privilege tax for so doing, and concludes that such result makes the tax unconstitutional in that it indirectly burdens its interstate business.

To this contention we reply, (1) that the constitutional provision declaring the plaintiff in error a common carrier, imposes no greater burden on it, so far as the taking of local business is concerned, than was imposed at common law, for while sleeping car companies may not be common carriers for all purposes, and while they have been by some courts held to be carriers, by others inn keepers, and by others neither, but a sort of hybrid between the two, yet all concur in holding that they are *quasi* public concerns, in so far as that they must serve all alike; (2) that the constitutional provision in question making them common carriers does not require them to do any more, so far as this case is concerned, than they would have been required to do at common law; that its duty as common carrier is not to do all kinds of carrying business, but to serve all persons alike in the kind of business it elects and offers to do. It is clearly competent for any common carrier, even a railroad company, to restrict its business to interstate business, if it see fit, provided the local business be not profitable. Even a railroad company can, upon reasonable grounds, select the kind of business it will undertake to carry on, but once having made such selection, it must serve all persons, of like class, alike. It seems clear that this constitutional provision making the plaintiff in error a common carrier, does in nowise affect its right to decline to do a local business, if such local business be unprofitable. Its right, like the right of

every other common carrier, now and still is, to classify the business it will engage in, upon any reasonable basis, and when thus reasonably classified and limited, to serve all persons alike, within such limitations.

Hale on Bailments, page 322, states the rule as follows:

> "The duty of a common carrier to carry for all who offer arises from the public profession he has made, and is limited to it. A person may profess to carry a particular description of goods only, as, for instance, cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be compelled to carry to or from intermediate places. But to the extent of their public profession, common carriers must carry for all who offer."

And cites the following authorities in support thereof:

> "*Johnson v. Railway Co.*, 4 Exch., 367; *Central R. & B. Co. v. Lampley*, 76 Ala., 357; *Honeyman v. Railroad Co.*, 13 Or., 352, 10 Pac., 628; *Kimball v. Railroad Co.*, 26 Vt., 247; *Pitlock v. Wells, Fargo & Co.*, 109 Mass., 452; *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16, 33, Fed. Cas. No. 2, 730; *Sewall v. Allen*, 6 Wend., 335, 346; *Kuten v. Railroad Co.*, 1 Bliss, 35, Fed. Cas. No. 7, 955. Carriers of money: *Shelton v. Robinson*, 7 N. H., 157; *Kemp v. Coughtry*, 11 Johns., 107, 109; *Emery v. Hersey*, 4 Greenl., 467; *Harrington v. McShane*, 2 Watts (Pa.), 443; *Merwin v. Butler*, 7 Conn., 138; *Dwight v. Brewster*, 1 Pick. (Mass.), 50."

III.

But if the contention of plaintiff in error be correct, that under the laws of Mississippi it is compelled to do this local business and at a loss, and that thus its interstate business is indirectly burdened, then its remedy is to refuse the local business on that ground, for it is the law declaring sleeping car companies common carriers that, in that event, would be unconstitutional and void, and not the law fixing the license tax. It does not lie in its mouth to first do the local business and get all the profit out of such business, if there be any, and then to refuse to pay the tax if it fails to be profitable, to accept all the benefits and decline all the burdens. The law requiring the local business to be done at a loss, must be attacked and resisted, and not the law requiring the tax to be paid.

IV.

The contention that because this tax indirectly affected and burdened the interstate business of plaintiff in error, it is invalid, seems to be wholly without merit. Any tax levied for any purpose would necessarily have that effect on the business of every person who happened to be engaged in both local and interstate enterprises.

In the case of *Adams v. Telegraph Co.*, 71 Miss., 565, which case was affirmed on appeal to this court, the Supreme court of Mississippi says:

> "Every tax is a burden, and, to the extent imposed, is an interference with the pursuit or business upon which it is laid. If the business is partly interstate commerce, then that commerce is incidentally affected and interfered with by every tax, of any nature whatever, that may be levied on it.
>
> "In the case at bar there is no direct burden upon

interstate commerce; there is no further interference with it than will be found necessarily to result from the imposition of any burden of taxation in any shape."

The tax in the above case was a privilege license upon the business generally of a telegraph company, and was not limited by its terms to the local business as in the case at bar. If it be permissible to levy a privilege tax as in that case, so much the more can it be done as in this case, by limiting such tax strictly to the local business.

In view of the recent announcements from this court, we do not believe that it will be seriously contended here, that a State has no authority to require a privilege tax of a foreign corporation doing a local business in such State, even though such tax may indirectly affect its interstate business. This court in the case of *L. & N. Railroad Co. v. Kentucky*, 183 U. S., 518, disposes of this question of the validity of a tax that only indirectly affects interstate commerce, as follows:

"The final contention that paragraph 218 of the Constitution of Kentucky operates as an interference with interstate commerce, and is therefore void, need not detain us long.

"It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the State, and the long and short distances mentioned are evidently distances upon the railroad line within the State. The particular case before us is one involving only the transportation of coal from one point in the State of Kentucky to another by a corporation of that State.

"It may be that the enforcement of the State regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result

is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government, to be unlawful, must be direct, and not the mere incidental effect of enforcing the police powers of a State.

"*New York, State E. & W. R. Co. v. Pennsylvania*, 158 U. S., 431, 439, 39 L. ed., 1043, 15 Sup. Ct. Rep., 896.

"*Henderson Bridge Co. v. Kentucky*, 166 U. S., 150, 41 L. ed., 953, 17 Sup. Ct. Rep., 532.

"A discussion of this subject will be found in the opinion of this court in *Louisville & N. R. R. Co. v. Kentucky*, 161 U. S., 701, 40 ed., 859, 16 Sup. Ct. Rep., 714, where the same conclusion was reached."

We also respectfully refer this court to the able opinion of the Supreme Court of Mississippi in this case, to be found in the record (p. 16), and also in 78 Miss. Rep., p. 814.

We ask that the judgment of the lower court be affirmed.

Respectfully submitted.

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Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 138.—October Term, 1902.

The Pullman Company, Plaintiff in Error, vs. Wirt Adams, State Revenue Agent. } In error to the Supreme Court of the State of Mississippi.

[March 2, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action for taxes brought by the revenue agent of the State of Mississippi against the Pullman Company. The defendant in due form raised the objection that the tax law was void as an interference with commerce between the States. Judgment was given for the plaintiff in the local State court, and the judgment was affirmed by the Supreme Court of the State. 78 Miss. 814. The case then was brought here by writ of error.

The tax in question was imposed by the following sections of the Mississippi Code of 1892: "§ 3317. A tax on privileges is levied as follows, to wit: . . . § 3387. Sleeping car companies: On each sleeping and palace-car company carrying passengers from one point to another within the State, one hundred dollars, and twenty-five cents per mile for each mile of railroad-track over which the company runs its cars." We assume that the last words mean what afterwards was expressed by an amendment, "over which the company runs its cars in this State."

The Pullman Company is an Illinois corporation. Its sleeping cars were carried by various railroad companies, and all of them were carried into the State from another State, or out of the State to another State, or both. But such cars in their passage also carried passengers from point to point within the State, and a specific fare was collected by the servants of the Pullman Company. The company attempted by pleas and by an offer of evidence to bring before the court the fact that its receipts from this class of passengers did not equal the expenses chargeable against such receipts. It contended that these facts would show that the business within the State was merely a burden on its commerce between the States, while at the same time, it argued, it was compelled to assume that burden by § 195 of the State constitution, which declares sleeping car companies to be common carriers and subject to liability as such. The pleas were held bad on demurrer, the evidence was rejected, and the jury was instructed to find for the plaintiff on the facts admitted. These rulings

and the refusal of the court to declare the above mentioned § 3387 unconstitutional are the errors assigned.

If the clause of the State constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the State constitution and the statute combined would impose a burden on commerce between the States analogous to that which was held bad in *Crutcher* v. *Kentucky*, 141 U. S. 47. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the State, the case is governed by *Osborne* v. *Florida*, 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax.

As the validity of the tax is thus bound up with the effect of the section of the State constitution, we think that the Pullman Company was entitled to know how it stood under the latter, and that a judgment against it could not be justified by reasoning which leaves that point obscure. We are somewhat embarrassed in dealing with the case, because we are not quite certain whether we rightly interpret the intimations upon the subject in the judgment under review. If the constitution of Mississippi should be read as imposing an obligation to take local passengers, the question for us might be which, if not both, the clause of the constitution or the tax act, is invalid. But we assume that the opinion of the Supreme Court of Mississippi intends to meet the difficulty frankly, and when it says that the argument against the tax drawn from the above interpretation of the constitution is fallacious, we take it as meaning that no such interpretation will be attempted in the future, and we take it so the more readily that we can see no ground for a different view. If we are right in our understanding the judgment of the Supreme Court was correct for the reason sufficiently stated above.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.